INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

VOLUME III

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA *c.* ÉTATS-UNIS D'AMÉRIQUE)

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The case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, entered on the Court's General List on 9 April 1984 under number 70, was the subject of Judgments delivered on 26 November 1984 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392) and 27 June 1986 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986*, p. 14). Following the discontinuance by the applicant Government, the case was removed from the List by an Order of the Court on 26 September 1991 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures and consequent proceedings; Memorial of Nicaragua (Jurisdiction and Admissibility).
Volume II. Counter-Memorial of the United States of America (Jurisdiction and Admissibility); Declaration of Intervention by El Salvador and observations thereon by Nicaragua and the United States of America.
Volume III. Oral arguments on jurisdiction and admissibility; exhibits and documents submitted by Nicaragua and the United States of America in connection with the oral procedure on jurisdiction and admissibility.
Volume IV. Memorial of Nicaragua (Merits); supplemental documents.
Volume V. Oral arguments on the merits; Memorial of Nicaragua (Compensation); correspondence.

In internal references bold Roman numerals refer to volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the volume in question. On the other hand, the page numbers which are preceded or followed by a reference to one of the pleadings only relate to the original pagination of the document in question, which, if appropriate, is represented in this edition by figures within square brackets on the inner margin of the relevant pages.

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L'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, inscrite au rôle général de la Cour sous le numéro 70 le 9 avril 1984, a fait l'objet d'arrêts rendus le 29 novembre 1984 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 392) et le 27 juin 1986 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1986*, p. 14). A la suite du désistement du gouvernement demandeur, elle a été rayée

du rôle par ordonnance de la Cour du 6 septembre 1991 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), ordonnance du 26 septembre 1991, C.I.J. Recueil 1991*, p. 47).

Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l'ordre suivant :

Volume **I**. Requête introductive d'instance ; demande de mesures conservatoires et procédure y relative ; mémoire du Nicaragua (compétence et recevabilité).
Volume **II**. Contre-mémoire des Etats-Unis d'Amérique (compétence et recevabilité) ; déclaration d'intervention d'El Salvador et observations du Nicaragua et des Etats-Unis d'Amérique sur cette déclaration.
Volume **III**. Procédure orale sur les questions de compétence et recevabilité ; documents déposés par le Nicaragua et les Etats-Unis d'Amérique aux fins de la procédure orale relative à la compétence et à la recevabilité.
Volume **IV**. Mémoire du Nicaragua (fond) ; documents additionnels.
Volume **V**. Procédure sur le fond ; mémoire du Nicaragua (réparation) ; correspondance.

S'agissant des renvois, les chiffres romains gras indiquent le volume de la présente édition : s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui ne sont précédés ou suivis que de la seule indication d'une pièce de procédure visent la pagination originale du document en question, qui, en tant que de besoin, est reproduite entre crochets sur le bord intérieur des pages concernées.

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ORAL ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, from 8 to 18 October and 26 November 1984,
President Elias presiding

PLAIDOIRIES SUR LA COMPÉTENCE ET LA RECEVABILITÉ

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye, du 8 au 18 octobre et le 26 novembre 1984,
sous la présidence de M. Elias, Président

SIXTH PUBLIC SITTING (8 X 84, 3 p.m.)

Present: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge ad hoc* Colliard; *Registrar* Torres Bernárdez.

Also present:

For the Government of Nicaragua:

H.E. Mr. Carlos Argüello Gómez, Ambassador, *as Agent and Counsel;*

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the Institut d'études politiques de Paris,

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the United States Supreme Court, Member of the Bar of the District of Columbia, *as Counsel and Advocates;*

Mr. Augusto Zamora Rodriguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia and the State of California,

Mr. Paul W. Khan, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia, *as Counsel.*

For the Government of the United States of America:

Hon. Davis R. Robinson, Legal Adviser, United States Department of State, *as Agent and Counsel;*

Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, United States Department of State,

Mr. Patrick M. Norton, Assistant Legal Adviser, United States Department of State, *as Deputy-Agents and Counsel;*

Mr. Ted A. Borek, Assistant Legal Adviser, United States Department of State,

Mr. Myres S. McDougal, Sterling Professor of Law Emeritus, Yale University, Yale Law School, New Haven, Connecticut; Distinguished Visiting Professor of Law, New York Law School, New York, New York,

Mr. John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, Charlottesville, Virginia,

Mr. Fred L. Morrison, Professor of Law, the Law School of the University of Minnesota, Minneapolis, Minnesota,

Mr. Stefan A. Riesenfeld, Professor of Law, University of California School of Law, Berkeley, California, and Hastings College of the Law, San Francisco, California, Mr. Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, Athens, Georgia; Bemis Professor of International Law Emeritus, Harvard Law School, Cambridge, Massachusetts, *as Counsel*;

Ms Frances A. Armstrong, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Michael J. Danaher, Member of the Bar of the State of California,

Ms Joan E. Donoghue, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms Mary W. Ennis, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Peter M. Olson, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Jonathan B. Schwartz, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms Jamison M. Selby, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. George Taft, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms Gayle R. Teicher, Attorney-Adviser, Office of the Legal Adviser, United States Department of State, *as Attorney-Advisers.*

OPENING OF THE ORAL PROCEEDINGS

The **PRESIDENT**: The Court meets today to hear the oral arguments of the Parties in the case concerning *Military and Paramilitary Activities in and against Nicaragua* brought by the Republic of Nicaragua against the United States of America.

The Application of Nicaragua was filed on 9 April 1984 instituting proceedings against the United States in respect of a dispute concerning responsibility for *Military and Paramilitary Activities in and against Nicaragua*.

By an Order dated 10 May 1984[1], the Court decided, *inter alia*, that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984[2] time-limits were fixed for the filing of a Memorial by the Republic of Nicaragua and a Counter-Memorial by the United States of America, and those pleadings were duly filed within the time-limits fixed. The written proceedings being thus closed, the case is ready for hearing on the issues of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

Since the Court includes upon the bench a judge of United States nationality, but no judge of Nicaraguan nationality, the Republic of Nicaragua has exercised its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge *ad hoc*. The person chosen is Professor Claude-Albert Colliard, of French nationality. Professor Colliard was formerly a Professor of the Faculty of Law and Economic Science of Paris, Deputy Director of the Institute of Comparative Law, and founder of the Centre for Study and Research in International Law. He has taken part in numerous international activities, as member or chairman of the French delegation, or as consultant to international organizations.

Under Articles 31 and 20 of the Statute of the Court, a judge *ad hoc*, before taking up his duties, has to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. I now call upon Professor Colliard to make that declaration. Would those present please stand.

Professor **COLLIARD**: Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.

The **PRESIDENT**: Please be seated. I place on record the solemn declaration made by Judge Colliard, and declare him duly installed as Judge *ad hoc* in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

On 15 August 1984 the Republic of El Salvador filed in the Registry of the Court a Declaration of Intervention[3] under Article 63 of the Statute. In accordance with the Rules of Court, the Parties to the case were invited to give their observations on this declaration.

By a letter dated 10 September 1984 the Republic of El Salvador requested a hearing on the question of its Declaration of Intervention.

---

[1] *I.C.J. Reports 1984*, p. 169.

[2] *Ibid.*, p. 209.

[3] **II**, pp. 451-462.

On 4 October 1984, the Court made an Order[1] on the Declaration of Intervention of El Salvador; and I shall now read the operative clauses of that Order.

> "The Court, by 9 votes to 6, *decides* not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador."

Those in favour of that decision were myself, Vice-President Sette-Camara, Judges Lachs, Morozov, Nagendra Singh, Oda, El-Khani, Mbaye and Bedjaoui. Judges Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings and de Lacharrière voted against. The Order continues: the Court

> "*[d]ecides* that the Declaration of Intervention of the Republic of El Salvador is inadmissible inasmuch as it relates to the current phase of the proceedings brought by Nicaragua against the United States of America".

That decision was adopted by 14 votes to 1, the judge voting against being Judge Schwebel. Judge Colliard did not take part in the decisions set out in this Order.

Judges Nagendra Singh, Oda and Bedjaoui appended separate opinions to the Order, and Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière appended a joint separate opinion. Judge Schwebel appended a dissenting opinion to the Order.

Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court has decided that copies of the pleadings on the questions of jurisdiction and admissibility, and the documents annexed, will be made accessible to the public with effect from the opening of the present oral proceedings. Copies thereof have also been made available to the Government of El Salvador.

On 5 October 1984 the Agent of Nicaragua transmitted to the Court a number of new documents to which it is intended to refer during the present oral proceedings. In accordance with Article 56 of the Rules of Court, copies thereof were forthwith transmitted to the Agent of the United States.

By agreement between the Parties, approved by the Court, the Agent in Counsel for the Republic of Nicaragua will address the Court.

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[1] *I.C.J. Reports 1984*, p. 215.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GOMEZ: Mr. President, Members of the Court. May it please the Court.

Nicaragua submits that it has fully demonstrated that the Court has jurisdiction in this case and that Nicaragua's Application is completely admissible. In the first place Nicaragua has accepted the compulsory jurisdiction of the Court. As Nicaragua's Memorial of 30 June demonstrates, and as Professor Chayes will further show this afternoon, under the terms of Article 36 (5) of the Statute of the Court Nicaragua's declaration of 1929 operated to bind Nicaragua to this Court's jurisdiction when Nicaragua ratified the Charter of the United Nations in 1946.

As Agent for my Government, I wish to make one thing perfectly clear. Nicaragua has always believed that it was bound by the Court's jurisdiction and has always acted in a manner consistent with that belief.

It has been said by the United States, in an attempt to contradict this fundamental point, that Nicaragua never completed its internal process of ratification of the Statute of the Permanent Court of International Justice. At the hearing on interim measures of protection, I placed myself on record affirming that, based on my knowledge as a Nicaraguan lawyer, former Minister of Justice and Agent of Nicaragua in these proceedings the Statute of the Permanent Court of International Justice was ratified by the Nicaraguan Government — I reiterate that affirmation today.

The Constitution of Nicaragua described by the United States as in force in the 1930s was in fact never in force. Its title clearly states "Constitution Non Nata de 1911" or, in translation, "Unborn Constitution of 1911". For practical purposes, and to avoid introducing more documents, we can accept as validly in force Articles 100 and 101 of that Constitution because they are worded in the same way in the Constitution that was actually in force during the relevant time period. Those Articles clearly indicate that if the President did not object to the law within 10 days after having received it from Congress, the law was considered ratified, and the President should publish it. Publication of a law in Nicaragua can be effected by any method, written or oral. Whether then-President Sacasa ever published it in the usual — but not obligatory — way in the *Gaceta* is of no legal consequence. Its publication according to the Nicaraguan system is even confirmed by the fact that the United States State Department got a copy. The fact that in 1939 Nicaragua sent a telegram to the League of Nations advising that the instruments of ratification would be sent opportunely is further evidence that the internal ratification process was completed.

It has been said by the United States that the instruments of ratification were never sent by Nicaragua. Unfortunately, we have very scanty records in Nicaragua. At this point, I cannot certify the facts one way or the other. In our research of this affair, we investigated the Yearbooks published by the Ministry of Foreign Affairs of Nicaragua. These were regular yearly publications. But I found no trace of a Yearbook for 1939 in Nicaragua in the Government collections. The Library of Congress of the United States has those volumes but we were told no copy of a 1939 Yearbook was on the shelves — in fact, we don't know if it exists. If the instruments of ratification were sent — and there is no reason to doubt the good faith of the Ministry of Foreign Affairs in sending the telegram in which they indicated they would be sent — they would most likely have been sent by sea, the most common form of transmittal in that era. World War II, which was then in full progress, and the attacks on commercial shipping may explain why the instruments appear never to have arrived at the Registry of the Permanent Court.

In any case, these facts about events in the 1930s are only of historical interest. As I stated earlier Nicaragua's Memorial demonstrates that it became bound by the Court's compulsory jurisdiction when, as an original Member, it ratified the Charter of the United Nations and consequently the Statute of this Court. At that moment, Nicaragua's declaration of 1929, by virtue of Section 5 of Article 36 became applicable to the jurisdiction of the present Court. All this will be more fully demonstrated by Professor Chayes.

From 1946 to the present, Nicaragua has consistently maintained — and shown in every way practicable — that it is bound by the Court's compulsory jurisdiction. The first *Yearbook* of the International Court of Justice included Nicaragua in the list of States that had accepted the Court's compulsory jurisdiction. That was the first time Nicaragua was so listed. The *Yearbooks* of the prior Court had placed Nicaragua in the opposite category. This significant change could not have gone unnoticed in Nicaragua. Yet Nicaragua made no protest.

Nor could it have gone unnoticed in Nicaragua that every subsequent edition of the Court's *Yearbook*, and every other relevant United Nations publication — including the Secretary-General's Report — included Nicaragua in the list of States bound by the compulsory jurisdiction. Still there was no protest.

If this were not proof enough of Nicaragua's unwavering conviction that it was subject to the compulsory jurisdiction, we have the *King of Spain* case in this very Court, where Nicaragua did not contest Honduras's explicit assertion that Nicaragua was subject to the Court's compulsory jurisdiction. The United States argues that Nicaragua sought to avoid having the case heard by the Court and even denied that it was subject to the Court's jurisdiction. With all due respect, the United States has turned the historical record upside down.

Professor Chayes, in his customary way, has made a thorough and careful examination of the historical record, and will address this point in detail this afternoon. For the moment, I will say that the record fully establishes that it was always Nicaragua's desire that the dispute with Honduras be heard in this Court. After all, it was Nicaragua's desire to undo the arbitral award made by the King of Spain in Honduras's favour. Honduras was the one seeking to prevent the validity of the award from being litigated.

Thus, in 1956, Nicaragua consulted two eminent international jurists to find out what juridical remedies — including an application to this Court — were available to Nicaragua. They were Professors Charles Rousseau and Suzanne Bastid. Both recommended an application to this Court. In the course of their lengthy opinions, both considered Nicaragua's acceptance of the Court's jurisdiction. Neither advised Nicaragua that it had not validly accepted the jurisdiction.

While Professor Rousseau thought the situation ambiguous, Madame Bastid, whose opinion was received later, firmly concluded that Nicaragua's acceptance of the compulsory jurisdiction was valid — by virtue of the application of Article 36 (5) — and that Nicaragua was indeed bound by the compulsory jurisdiction. I might point out here that Professor Rousseau as well later concluded that Nicaragua was indeed bound by the compulsory jurisdiction.

Against this background, the United States presents a document from its internal files and contends it is proof that Nicaragua's then Ambassador to

Washington stated that Nicaragua was not subject to the Court's jurisdiction. The document is plainly incompetent as evidence and, in any event, does not reflect any such statement by the Nicaraguan Ambassador. As the document itself reveals, it was the United States representative at that meeting who made reference to Nicaragua's acceptance of the compulsory jurisdiction, not the Nicaraguan Ambassador. The Nicaraguan Ambassador, referring to the entire problem of finding an appropriate resolution with Honduras, is reported only as having said that an agreement between the two countries would have to be reached to overcome this difficulty. By selective quotation the United States tries to make it appear that the Ambassador's reputed remark related to the compulsory jurisdiction question. Any such reference is immediately dispelled upon reading the entire document.

Finally there is this lawsuit initiated by Nicaragua. Nicaragua's Application asserts that Nicaragua is bound by the compulsory jurisdiction of the Court. Nicaragua has thus done everything one might expect from a State that is and considers itself bound by compulsory jurisdiction. One, it has never protested its inclusion in the list of States accepting compulsory jurisdiction that has appeared in every relevant official publication. Two, it has appeared as Respondent in a case where jurisdiction was asserted in part on the basis of Nicaragua's acceptance of compulsory jurisdiction and it acquiesced in that assertion. Three, it has filed an Application asserting jurisdiction based on its declaration accepting compulsory jurisdiction.

Given all these events, if the Applicant and the Respondent changed places, that is if the United States were suing Nicaragua, could anyone doubt what the result would be if Nicaragua attempted to deny jurisdiction based on its apparent omission in the 1930s to deposit in the Registry of the expired Permanent Court of International Justice its instrument of ratification of the now extinct Protocol of Signature of the Statute of the Court? I seriously doubt that Nicaragua could find any recognized international lawyer to even make such an argument on its behalf.

Before this case, not even the United States Department of State believed Nicaragua's acceptance of compulsory jurisdiction was in any way invalid. This is shown by two facts. First, the unbroken listing of Nicaragua being so bound by the compulsory jurisdiction of the Court, without limitation in all editions of the authoritative State Department publications *Treaties in Force*. Second, the letter from Secretary of State Shultz of 6 April 1984, the sole purpose of which was to prevent Nicaragua from maintaining this suit. Why should such a drastic measure as this letter have been taken if the United States believed Nicaragua was not subject to compulsory jurisdiction?

The letter of Secretary of State Shultz is truly disappointing, especially when compared with the Memorandum of John Foster Dulles, who later also served as Secretary of State, dated 10 July 1946, and concerning acceptance by the United States of the compulsory jurisdiction of the International Court of Justice. Mr. Dulles wrote:

> "The United States, since its formation, has led in promoting a reign of law and justice as between nations. In order to continue that leadership, we should now accept the jurisdiction of the I.C.J. If the United States, which has the material power to impose its will widely in the world, agrees to submit to the impartial adjudication of its legal controversies, that will inaugurate a new and profoundly significant international advance. Conversely, a failure to take that step would be interpreted as an election on our part to rely on power rather than reason."

In 1984, we have another Secretary of State sending notice to the world that in disputes with any Central American State, the United States Government tends to rely on power rather than reason for the next two years.

The United States says that the right place to deal with this problem is Contadora. How hollow those words ring now. The most significant progress in the Contadora process was achieved after the Court's 10 May Order. After that date, Nicaragua and Costa Rica signed the first concrete agreement to emerge from that process, dealing with the border situation. After that date, the four Contadora countries, in consultation with the five Central American States, presented the draft of a final peace agreement. On 22 September, Nicaragua formally communicated its acceptance of the peace agreement and its intention to sign and ratify it. One would think, given the pious representations made by the United States to this Court, the United States would have applauded this action as did the Foreign Ministers of the entire European Economic Community who met in Central America a few days later. Instead, the United States bitterly criticized Nicaragua for its action and took immediate steps to torpedo the Contadora peace initiative. These actions by the United States Government have been amply reported in the world press and we have introduced them in Court for the record. Probably, one headline from the *Washington Post* of 30 September summarizes this. I quote: "US Urges Allies to Reject Contadora Plan." There is certainly tortuous reasoning involved in any argument that resort to this Palace of Peace could impede peace in Central America.

If it were necessary to prove the obvious, this case proves that the use of legal remedy is only conducive to peaceful settlements.

The United States contends that this case should not go forward in the absence of El Salvador, Costa Rica and Honduras, because according to the United States, their rights are somehow involved here. This is not true. Nicaragua's Application raises accusations only against the United States and seeks redress only from the United States. There are no claims against and no relief sought from any other State.

The United States attempts to make it appear as though Nicaragua is trying to prevent the other Central American States from receiving military or economic assistance from the United States. It is not true. Nicaragua's Application seeks no such thing. All Nicaragua seeks is an end to the illegal United States mining of Nicaraguan ports, and an end to the illegal United States support for the mercenary army — created, financed and directed by the United States — that is conducting military and paramilitary attacks against my country in a self-proclaimed effort to overthrow my Government. Nicaragua seeks an order preventing the United States from providing any support, either directly or indirectly, to these forces.

Surely none of the other Central American States has the right to have the United States mine our ports or engage a mercenary army to carry out military and paramilitary attacks against Nicaragua and overthrow our Government.

Mr. President and Members of the Court, at present we are engaged in a hearing of a decidedly technical legal nature. For this reason, I cannot dwell on the very tragic circumstances that have originated this case and that have not abated since its inception.

Nonetheless, in compliance with the Order of 10 May of this year in which you decided to keep the matters covered by that Order continuously under review, I must inform you very briefly that the illegal use of force by the United States against Nicaragua has increased enormously since the date of the Order.

More than 1,000 Nicaraguans have been killed, wounded or maimed since that time. Cities, towns and economic targets have been hit constantly by the mercenary army financed and directed by the United States. The United States Senate, at the urging of the Reagan Administration, voted to appropriate another 28,000,000 United States dollars for the illegal war to be carried on at least through 30 September 1985.

President Elias has requested both Parties to be concise, to centre exclusively on the legal questions of jurisdiction avoiding repetitive or political arguments. For this reason, I will only briefly address Part II of the United States Counter-Memorial.

From a strictly legal point of view we reiterate our position that the fact of the concurrence of negotiations does not enervate the jurisdiction of this Court, as was clearly stated in the hostages' case.

From a practical point of view, I can add at this point in time with the experience of the past months, that the legal reasoning contained in the Court's decisions to allow legal remedy to run parallel to negotiations has not proven a hindrance in the case at hand. If it were necessary to insist on the obvious, this case, I repeat, proves that the use of legal remedy is only conducive to peaceful settlements. The success or failure of the United States attempts to destroy Contadora in no way undermines this truth.

This section of the United States Counter-Memorial pretends to justify the illegal attacks of the United States against Nicaragua in the supposed armed attacks of Nicaragua against its neighbours. This point has already been amply discussed in the oral hearings on the interim measures of protection and therefore I will reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings.

At present, I will only point to the self-evident fact that the United States has bases, radar stations, spy planes, spy ships, the armies of El Salvador and Honduras at its service, constant manœuvres in the Central American area involving thousands of men; and with all this in nearly four years it has not been able to prove one single case of armed traffic from Nicaragua for example to El Salvador. Nicaragua with very modest means has downed planes traceable to the CIA, it has satisfactory proof of United States attacks against Nicaragua.

Recently El Salvador requested a *sui generis* intervention in these proceedings. Nicaragua made no objections to the intervention. The road to participate in the following phase of these proceedings is still open to El Salvador. Nicaragua reiterates that it has no objection to participation of El Salvador if it fulfils the normal legal requirements.

In fact, Nicaragua has no objection to participation of other States. Nicaragua believes that respect for international law requires a State to appear in court when it is accused by another State, not seek or invent formalistic pretexts to avoid the court in order to resort to armed force instead.

The United States Government states that Nicaragua is sending weapons, among others to the Frente Farabundo Marti of El Salvador. To say that Nicaragua is not doing so would be putting one word against another in this phase, and it is sometimes forgotten by the public in general that the burden of proof is on the accuser. I must point out that a court of justice does not forget where the burden of proof lies. That is why Nicaragua has no fear for El Salvador's participation and that is very clearly why the United States fears to be brought before this highest of tribunals.

Mr. President, Members of the Court, we are faced with a case in which the lives and well-being of thousands of people literally hang in the balance of the scales of this Court of peace. Nicaragua is seeking sanctuary in this Palace of Peace. Nicaragua should not be turned away from sanctuary based on some flimsy legal formalities that have been formulated *ad hoc* by the United States

Government for these proceedings. Up to the time of presenting our case no one in the world questioned Nicaragua's right to present itself before this tribunal.

I wish to thank you, Mr. President, Members of the Court, for your attention. In the following presentation Professor Chayes will give a brief outline of the way we have divided the different expositions. Now I ask the Court to recognize Professor Chayes.

ARGUMENT OF PROFESSOR CHAYES

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor **CHAYES**: Mr. President, Members of the Court. May it please the Court. Ambassador Argüello has laid before you the larger context of this litigation. We turn now more directly to the matters before the Court in these oral proceedings which tend to be somewhat more dry, technical and professional.

The Court in its Order indicating provisional measures decided that "The written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application" (Order of 10 May 1984, para. 41 D). That is what is before us now. My colleagues and I have divided this presentation among us.

Today I shall maintain that, by virtue of the operation of Article 36 (5), of the Statute of the Court, properly interpreted, Nicaragua must be deemed to have accepted the compulsory jurisdiction of the International Court of Justice.

My colleague, Professor Brownlie, with whom I am personally deeply privileged to appear in this proceeding, will then argue two propositions:

First, that the conduct of the Parties to this case supported by the conduct of other parties to the Statute of the Court and the opinion of the most qualified scholars over the past 38 years establish as an independent basis of jurisdiction, that Nicaragua has submitted to the compulsory jurisdiction of this Court.

And — the second point to be addressed by Professor Brownlie — the letter of 6 April 1984 from Secretary of State Shultz to the Secretary-General of the United Nations was ineffective to terminate or alter the declaration of the United States of 14 August 1946 accepting the compulsory jurisdiction of the Court.

Thereafter, Mr. Paul Reichler will show that the third reservation to the United States declaration, the so-called "Vandenberg Reservation", cannot be properly invoked in this case to defeat the jurisdiction of the Court.

On the questions of admissibility, Professor Alain Pellet of the University of Paris, with whom it is also a distinct honour to be associated, will play the leading role. But it is too early to burden the Court with the exact division of responsibilities among us.

The Plain Meaning of Article 36 (5)

Let us turn now to Article 36 (5). We have before us a quintessentially legal problem, of the kind that lawyers and judges spend most of their lives resolving. We are faced with a text. Our task is to discover the true meaning of that text — in the light of its language, its purpose and the usage of those who have had to attribute meaning to it heretofore.

Let me first read the text. In the course of the next few days we will all come to know it very well.

Article 36 (5) provides: "Declarations . . ." I stress that first word. Nicaragua attaches great importance to that word. It is what Article 36 (5) is all about: *declarations*.

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed,

> as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

Nicaragua made such a declaration under Article 36 of the Statute of the Permanent Court of International Justice on 24 September 1929. The terms of that declaration were as follows:

> "On behalf of the Republic of Nicaragua I recognise as obligatory unconditionally the jurisdiction of the Permanent Court of International Justice."

The declaration was without limit of time. Thus, it "had not yet expired" and was "still in force" when the Statute of the International Court of Justice came into effect on 24 October 1945. Nicaragua had already become a party to the Statute of the Court, when it ratified the United Nations Charter on 6 September 1945. All the conditions of Article 36 (5) are thus met and Nicaragua must be "deemed, as between the parties to the present Statute, to have accepted the compulsory jurisdiction of the International Court of Justice . . .".

One is tempted to say Q.E.D. and sit down at this point.

But the United States professes to find a different meaning in the text of the Article. They say it is the "plain meaning" of the language. They take ten pages of the Counter-Memorial in attempting to establish the asserted "plain meaning", however, so it cannot be as plain as all that.

In brief, the position of the United States is that "still in force" means "binding" and that "binding" means "made by a State that was a party to the Statute of the Permanent Court".

It will not have escaped the Court that these words — "binding" and "made by a State that was a party to the Statute of the Permanent Court" — are not to be found in the text of Article 36 (5). Nevertheless, the United States asserts that:

> "according to the plain meaning of the words . . . Article 36 (5) applies only to declarations binding the declarant to accept compulsory jurisdiction of the Permanent Court" (II, Counter-Memorial, para. 79 (argument heading)).

To this, the first response is "If that is what the draftsmen of the Statute meant, why didn't they say so?" There is a very simple way of expressing that thought. As the United States has pointed out, those who drafted the Statute were distinguished scholars of the Court and practitioners before it. They were versed in its jurisprudence and understood the requirements of careful and precise expression. The draftsmen knew very well how to say "accepted the compulsory jurisdiction". In fact, they did say it in the last clause of Article 36 (5). They did not regard the expression as colloquial or otherwise inappropriate for the Statute. If they had wished to achieve the result contended for by the United States, Article 36 (5) would have read as follows:

> "States bound to accept the compulsory jurisdiction of the Permanent Court of International Justice under Article 36 of the Statute shall be deemed as between the parties to the present Statute, to have accepted the compulsory jurisdiction of the International Court of Justice in accordance with the terms of their declarations."

That is a simple and direct form of words, the plain meaning of which truly is what the United States asserts as to the much different language actually chosen by the draftsmen of the Statute.

The grammatical subject and the semantic focus of the language of the real Article 36 (5) is "*Declarations* made under Article 36 of the Statute of the Permanent Court . . .". This, on the face of it suggests that the concern of the draftsmen was with declarations previously made rather than with the status of the parties who made them.

If there is any possible ambiguity about the words "still in force" it is resolved by reference to the French text of the Article. That is why, a moment ago, I stressed that the declaration of Nicaragua, made under the Statute of the Permanent Court "had not yet expired" and so "was still in force" at the critical moment. The Court will recognize a reference to the French text which I will now read with apologies to the French-speaking justices and any other French speakers in the audience: "Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée . . ."

"Pour une durée qui n'est pas encore expirée . . ." There is surely no ambiguity about the meaning of that phrase: "for a period that has not yet expired". And there is no doubt that the English text was supposed to mean the same thing as the French. The pertinent portion of the proceedings of Committee IV of the San Francisco Conference on this point are discussed in the three judges' dissent in the *Aerial Incident of 27 July 1955* case (*I.C.J. Reports 1959*, p. 162) and in the Memorial (**I**, at paras. 16-18).

The Counter-Memorial refers also to the Russian, Spanish and Chinese versions of the Article (**II**, Counter-Memorial, para. 78). Judge Hudson, writing in October 1945, noted that "As the text . . . of the new Statute consists of versions in five languages . . . a more complicated situation may arise as discrepancies reveal themselves". He goes on to say, however, that "English and French were employed as the working languages in drafting . . . the new Statute, and this fact may still give these versions some primacy for purposes of interpretation" (Hudson, "The New World Court", 24 *Foreign Affairs* 1, 83 (October 1945)). Professor Rosenne made this same point in his speech to the Court in the *Aerial Incident* case (*I.C.J. Pleadings*, p. 464). And see the joint dissenting opinion in the *Aerial Incident* case (*I.C.J. Reports 1959*, p. 161).

The United States professes to find great comfort for its "plain meaning" argument in its asserted inability to find anyone else who reads the Article the way Nicaragua does. I quote from their Counter-Memorial:

> "As far as the United States has been able to ascertain, no one has ever advocated the interpretation of Article 36 (5) that Nicaragua advances in its Memorial." (**II**, Counter-Memorial, para. 59.)

The United States, apparently, did not look very far. If it had consulted its own Observations on the Preliminary Objections of Bulgaria filed with this Court in the *Aerial Incident* case, it would have found an argument that Nicaragua could well adopt as a fair statement of its own. I refer you to *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pages 311-322. It is perhaps worth a few moments to review the highlights of the United States argument in that case to bring out how closely it comports with that of Nicaragua here.

The critical paragraph in the United States argument appears at page 319. The United States had to recognize of course, that after the dissolution of the Permanent Court (or at least after Bulgaria formally recognized the dissolution when it signed the Treaty of Peace) Bulgaria could no longer be "bound" by its acceptance of that Court's jurisdiction. If Article 36 (5) were to be construed as the United States now contends it should be — that is to extend "only to declarations binding the declarant to accept the compulsory jurisdiction of the

Permanent Court" (**II**, Counter-Memorial, para. 79) — it could not apply to Bulgaria. Thus, the United States argued, just as Nicaragua does here, that the decisive question under Article 36 (5) is the duration of the declaration. Here I am quoting from their Observations:

> "The intended and effective meaning of the words 'still in force' is to be seen in the French text of the provision: 'pour une durée qui n'est pas encore expirée.' The declarations referred to in Article 36, paragraph 5, were those made for a duration not yet expired. As applied to the Bulgarian declaration of 1921, the import of Article 36, paragraph 5, is clear: when Bulgaria became a party to the Statute of the Court, no period had come to an end within which the Bulgarian declaration was limited; for as we have seen, the declaration of 1921 was without limit of time." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 319.)

The very same words could be spoken of the declaration of Nicaragua. Indeed, that is the position of Nicaragua in this case.

The United States argument continues:

> "The words 'still in force' and 'pour une durée qui n'est pas expirée' were used in Article 36, paragraph 5, to distinguish declarations made for periods of time not yet expired from declarations which, according to their own terms, had come to an end." (*Ibid.*, p. 320.)

Again, this is the very position advanced here by Nicaragua.

The United States continues:

> "To hold, in construing this paragraph, that the Bulgarian declaration of 1921 is not covered, on technical and conceptual grounds, would be to defeat the constructive purposes of the provisions of the new Statute" (*Ibid.*)

To which I would say "Amen".

It is remarkable how the elaboration of the United States argument in the *Aerial Incident* case parallels that of Nicaragua here. The purpose of Article 36 (5) is defined in identical terms: "to prevent retrogression with respect to international jurisdiction simply because a new International Court of Justice was taking the place of the old Permanent Court" (*ibid.*; compare Nicaragua's Memorial, **I**, paras. 22, 23). There is the same reference to the French text as authoritative, the same interpretation of the drafting history of the Statute, the same emphasis on the analogous effect and purpose of Article 37 of the new Statute. Indeed, the United States in 1960 relied on the very paragraph of the very article by Judge Hudson that Nicaragua has cited in this case for its listing of Nicaragua as bound by the jurisdiction of the new Court. (See *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 316, citing Hudson, "The Twenty-fourth Year of the World Court", 40 *AJIL* 34 (1946); compare Memorial, para. 52.)

Although the United States Observations in *Aerial Incident* notes in passing that Bulgaria ratified the Statute of the Permanent Court, it makes no particular point of that fact (*I.C.J. Pleadings*, p. 312).

That is wholly natural. The United States position in the *Aerial Incident* case was that the declaration continued in force even though Bulgaria was *not* bound by the compulsory jurisdiction. To have laid any weight on the significance of the prior ratification would have undercut the United States argument that it is the terms of the declaration that count, not the status of the party as subject to the jurisdiction of the Court.

It cannot be said that the construction of Article 36 (5) contended for by the United States in the *Aerial Incident* case and by Nicaragua here was rejected by the Court in its decision in that case. The case of *United States* v. *Bulgaria* was never decided by the Court. It was withdrawn by the United States in 1960 under Article 69 of the Rules of Court (*I.C.J. Reports 1960*, p. 146).

Thus, the Court did not pass directly on the United States argument. Although both Israel and the United Kingdom, in companion cases, urged that the Court had jurisdiction over Bulgaria, neither of them advanced the interpretation of Article 36 (5) that was put forward by the United States in its Memorial. Indeed, the United States in this case recognizes that "as Agent for Israel in the *Aerial Incident* case, Professor Rosenne never suggested this theory" (**II**, Counter-Memorial, para. 145, p. 45, note 3). The Court itself disposed of the question before it in *Aerial Incident* on a different ground: that once the Permanent Court had been dissolved, there was no longer any "object" of the Bulgarian declaration, and therefore that the declaration must be regarded as lapsed despite its terms. Of course, there was no such lapse as to Nicaragua, which ratified the Statute of this Court when its declaration had not expired and before the dissolution of the Permanent Court. These points are elaborated in the Memorial (**I**) at paragraphs 33-36 and I need not repeat them here.

The point thus remains that the interpretation of Article 36 (5) for which Nicaragua contends here, and for which the United States was unable to find any support in the literature or previous jurisprudence of the Court, was the very position taken by the United States when it last addressed the issue in this forum in 1960.

The Original Understanding of Article 36 (5), with Special Reference to the Situation in the United States

The historical, juridical and political context in which the current Statute was drafted re-enforces the construction of Article 36 (5) that emerges from the text. The dominating ideas preoccupying the draftsmen, as the Court observed in *Barcelona Traction, Light and Power Company, Limited*, were continuity with the Permanent Court and preservation of its jurisprudence, including especially such progress toward extending its jurisdiction as had been made during its existence. Within this broad context, the draftsmen faced certain concrete problems, to which the decisions they made were concrete and specific responses.

The first question facing Committee IV at San Francisco was whether to continue with the old Court and the old Statute with necessary revisions, or to replace them both. "The first alternative", Judge Hudson tells us, "had commended itself to a large part of the legal profession" ("The New World Court", 24 *Foreign Affairs*, 75, 76, October 1945).

A basic problem faced by the draftsmen, however, was that they did not think it was either possible or desirable to make changes in the old Statute without the consent of all the parties. Of these parties to the old Statute, some 15 were neutral or enemy States not represented at San Francisco. The effort to secure their consent would at a minimum have caused delay, and might have raised other complications as well. Thus, again in the words of Judge Hudson, "In choosing the second alternative", that is a new court, "the Conference at San Francisco was moved by political rather than juristic considerations." (*Ibid.*) But, he went on, "The creation of a new Court was, in reality, little more than a rechristening and a reorientation of the old one." (*Ibid.*, p. 77.) Similarly, "The Statute of the new Court is substantially the same as the one drawn up in 1920 and revised in 1929." (*Ibid.*) This account of the decision to opt for a new court at San Francisco is confirmed, at least for the United States audience, by a detailed article of Judge Jessup, who was Assistant on Judicial Organization to the United States delegation at San Francisco (see Jessup, "The International Court of Justice of the United Nations", XXI *Foreign Policy Reports*, pp. 154, 160-161, 15 August 1945). Judge Jessup also points out that "While the Court is a 'new court' it is in a very real sense only a 'revised one', the successor of the old." (*Ibid.*, p. 161.)

In the same vein, the Rapporteur for Committee IV/1 at San Francisco reported:

> "The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter. In general, the new Court will have the same organization as the old and the provisions concerning jurisdiction will follow very closely those in the old Statute . . . To make possible the use of precedents under the old Statute the same numbering of the Articles has been followed in the new Statute.
>
> In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4 [which later became paragraph 5], and Article 37. Hence, continuity in the progressive development of the judicial process will be amply safeguarded. (*UNCIO*, Commission IV, doc. 913, IV/1/74 (1), 12 June 1945, p. 4.)

If the draftsmen and the United States advisers thought they were doing little more than "rechristening and reorienting" the Permanent Court, it would hardly come as a surprise to them to think that ratification of the "revised" Statute should perform the same function as ratification of its predecessor in perfecting Nicaragua's unexpired declaration.

The second major decision of the Conference was on the question of true compulsory jurisdiction. On this point, there is no doubt that the majority of the jurists on Committee IV would have preferred that solution, that is true compulsory jurisdiction. But their political masters would not permit it. As a "compromise", it was agreed that such progress as had been made in extending the jurisdiction of the Court — whether by declarations under the optional clause or in jurisdictional clauses of treaties — would be carried forward to the new Court. This decision was, of course, consistent with the general notion that the new Court was to be as much as possible a continuation of the old.

It thus appears that Article 36 (5) and Article 37 were in the nature of technical amendments, necessitated only by the prior decision, taken on extraneous political grounds, to create what was in form a new court rather than retain the old. Their function was to continue the situation as it had existed under the Permanent Court and to preserve the jurisdictional gains that had been achieved.

When it came to drafting Article 36 (5), however, another problem arose. A blanket provision transferring *all* declarations made under the old Statute might have been construed as reviving a number of declarations that had already expired. To do so would have been not to *continue* the existing situation, but to change it, not to preserve jurisdiction but to expand it. And it could by no means be assumed that the declarants of these expired declarations, even if represented at the Conference, would consent to their resurrection.

Seen in this light, the modifying phrase in Article 36 (5) — "which are still in force" or "made for a period which has not yet expired" — has only one function: it is designed to exclude declarations that had already expired. It has no bearing whatsoever on a declaration like Nicaragua's that had not expired. To carry forward Nicaragua's unexpired declaration would not change the existing situation or expand the pre-existing jurisdiction. On the contrary, Nicaragua was in exactly the same situation under the new Statute, as drafted, as it was under the old. In either case, ratification of the Statute of the Court would perfect its declaration.

That the modifying phrase in Article 36 (5) was directed exclusively at expired declarations is borne out by a number of sources.

Consider the exchange between the British and Australian delegates in the debate in Committee IV/1 on Article 36 (5). The British representative spoke in favour of "the compromise". He thought that some 40 States would thereby become automatically subject to the Court's jurisdiction. (*UNCIO* IV, doc. 759, IV/1/59, 2 June 1945, p. 248.) The Australian representative, Dr. Evatt, corrected this estimate:

> "He desired, however, to call attention to the fact that not forty but about twenty States would be automatically bound as a result of the compromise. In this connection he pointed out that of the fifty-one States that have adhered to the optional clause, three had ceased to be independent States, seventeen were not represented at the conference and about ten of the declarations of other States had expired." (*Ibid.*, p. 249.)

Similarly, Judge Jessup, in a contemporaneous article in the *American Journal of International Law*, wrote of Article 36 (5):

> "This important provision was inserted as a part of the attempt to avoid breaking the 'chain of continuity' with the past . . . It was estimated at the Conference that about twenty such declarations would become immediately applicable to the new Court, others having lapsed or having been made by States not original parties to the new Statute." ("Acceptance by the United States of the Optional Clause of the International Court of Justice", 89 *AJIL* 745, 749, n. 7 (1945)).

Nicaragua's declaration had not "lapsed" and Nicaragua *was* an original party to the new Statute. Thus it falls within neither of the categories mentioned by Judge Jessup or Dr. Evatt.

As a final note, this same reading is the one given by the dissenters in the *Aerial Incident* case:

> "We consider that the words 'which are still in force', when read in the context of the whole paragraph, can only mean, and are intended to mean, the exclusion of some fourteen declarations of acceptance of the compulsory jurisdiction of the Permanent Court which had already expired and the inclusion, irrespective of the continuance or dissolution of the Permanent Court, of all the declarations the duration of which has not expired." (*I.C.J. Reports 1959*, p. 161.)

All the evidence agrees: the phrase "which are still in force" or "for a period which has not yet expired" is directed and directed only at expired declarations. It is not concerned with unexpired declarations that, for some reason or another, had not been perfected. If the United States wishes to exclude Nicaragua from the operation of Article 36 (5), it must find some other way to do so.

While we are talking about the original understanding in the United States, on which the Counter-Memorial lays some stress, I should add that the record in the United States Senate at the time of the United States adherence to the optional clause is, likewise, not as clear as the Counter-Memorial would have it. It is true that Mr. Fahy, the Legal Adviser, presented in his testimony a list of 19 States covered by Article 36 (5) and that list did not include Nicaragua. His enumeration is repeated in the Senate Report. But a statement by Judge Hudson, included in the record of the hearings, listed Nicaragua as falling within Article 36 (5). (*Hearings before a Subcommittee of the Committee on Foreign Relations of the United States Senate on S. Res. 196, 77th Congress, 2nd Session*, 1946, p. 91 (deposited with the Registrar of the Court by the United States)). Moreover, Judge Hackworth, who was Legal Adviser at the time of the San Francisco Conference, stated in a speech also read into the record that 20 States were involved. (*Ibid.*, p. 19.) So too did comments of Judge Jessup (*ibid.*, p. 92) and Professor Quincy Wright (*ibid.*, p. 42).

It seems clear that the action of the Committee in recommending and the Senate in advising and consenting to the United States declaration cannot have been based on or influenced by any firm understanding of the number or names of the countries affected by the operation of Article 36 (5). Mr. Fahy's list appears to have been based on the last *Yearbook* of the Permanent Court, which, as we know, lists Nicaragua as not subject to the compulsory jurisdiction. When, in the very next year, the State Department, through Mr. Denys Myers of the Legal Adviser's Office, made its first careful study of the matter, it concluded that Nicaragua had accepted the compulsory jurisdiction of the International Court of Justice, and so stated publicly (I, Memorial, para. 81).

The United States, as we shall see, has not retreated from that conclusion in 40 years, until the beginning of this proceeding.

I want to spend a few moments on the jurisprudence of the Court.

THE JURISPRUDENCE OF THE COURT

The two principal cases in which the Court has previously considered the operation of Article 36 (5) and Article 37, the transitional provisions of its Statute, are *Aerial Incident* and *Barcelona Traction*. They are discussed at length in the Memorial and Counter-Memorial and there is no need to recapitulate that discussion here.

In candour, it must be admitted that there is an element of question-begging in any effort to apply the language of the opinions in those cases directly to the situation now before the Court. In neither of the cases did the Court focus expressly on the question here presented: the effect of the transition on a declaration made under the Statute of the Permanent Court that was by its terms unlimited but that never came into effect with respect to the Permanent Court because the ratification of its Statute by the declarant was somehow incomplete. Thus both Parties are able to seize upon passages in the opinions where the language supports their respective positions. In such a competitive battle of quotations the result is always something of a stand-off.

In order to determine the true bearing of those decisions on the present case, therefore, we must look beyond the snippets of language to the underlying rationale. There are three major opinions to be considered: (1) The majority opinion in *Aerial Incident*; (2) the three-judge dissent in that case; and (3) the opinion of this Court in *Barcelona Traction*. The first of these, the majority opinion in *Aerial Incident*, really has no significance at all for the present dispute. The Court held only that the declaration of Bulgaria, made under the Statute of the Permanent Court, was not "in force", within the meaning of Article 36 (5), when Bulgaria became a Member of the United Nations in 1955. This was because the declaration "lapsed" when the Permanent Court was dissolved in 1946. That result followed whether or not Bulgaria had ratified the Statute of the Permanent Court and was not affected by the fact of ratification *vel non*. Nothing in the opinion, either in holding or in considered *obiter dictum*, excludes or is even faintly inconsistent with the position here taken by Nicaragua: namely, that its declaration was "in force" within the meaning of Article 36 (5) when Nicaragua became an Original Member of the United Nations in 1945. The only qualification the *Aerial Incident* decision establishes for the operation of Article 36 (5) is that the declarant must have been an Original Member of the United Nations, and of course Nicaragua meets that requirement.

The matter is different with the dissenters. They were proceeding on a theory of the scope and operation of Article 36 (5). And that theory is inconsistent with the position of the United States in the present case. The theory embodies the two general principles already shown to have animated the draftsmen of the Article, and they were equally stressed by the dissenters: First, that the function and purpose of Article 36 (5) along with Article 37 was to ensure continuity between the old Court and the new. And second, that these two Articles were designed to preserve to the maximum extent possible the state of affairs with respect to compulsory jurisdiction that existed under the Permanent Court just before it went out of existence.

Thus, the dissenters emphasized that:

> "the establishment of the International Court of Justice and the dissolution of the Permanent Court . . . were closely linked by the common intention to ensure, as far as possible, the continuity of administration of international justice".

They continue:

> "While various considerations urged the dissolution of the Permanent Court and the creation of the International Court of Justice, there was general agreement as to the substantial identity of these two organs. In particular, every effort was made to secure continuity in the administration of international justice." (*I.C.J. Reports 1959*, p. 158.)

Further, the dissenters confirm that:

> "a study of the records of the Conference shows that a determination to secure the continuity of the two Courts was closely linked with the question of compulsory jurisdiction of the new Court in a manner which is directly relevant to the interpretation of paragraph 5 of Article 36" (*ibid.*, p. 159).

Indeed, even the majority in the *Aerial Incident* case acknowledged that:

> "the clear intention which inspired Article 36, paragraph 5, was to continue in being something that was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved" (*ibid.*, p. 145).

I have already shown that the combination of these two principles — continuity with the old Court and preserving "progress already achieved" — lead ineluctably to the conclusion that Article 36 (5) covers the Nicaraguan declaration. And as one would expect, the dissenters phrase their conclusion in just such terms. I quote their conclusion:

> "Accordingly, we reach the conclusion that, having regard both to the ordinary meaning of their language and their context, the words 'which are still in force' *refer to the declarations themselves*, namely, to a period of time.

> limited or unlimited, which has not expired regardless of any prospective or actual date of the dissolution of the Permanent Court. So long as the period of time of declarations made under Article 36 of the Statute of the Permanent Court still has to run at the time when the declarant State concerned became a party to the Statute of the International Court of Justice, those declarations fall within the purview of Article 36, paragraph 5, of the new Statute and 'shall be deemed to be acceptances of the compulsory jurisdiction of the International Court for the period which they still have to run and in accordance with their terms'." (*I.C.J. Reports 1959*, pp. 164-165 (emphasis added).)

I invite the Court to consider carefully this passage, which is expressly labelled "conclusion" and represents the carefully weighed words of the *Aerial Incident* dissenters. There is not a word in it about the declarant State being "bound" to accept the compulsory jurisdiction of the Permanent Court or having ratified its Statute. These notions are absent from the dissenting opinion for the same reason they were absent from the United States Memorial in the *Aerial Incident* case: because the position being maintained is that Bulgaria is subject to the compulsory jurisdiction of the International Court even though it is *not* bound by the compulsory jurisdiction of the Permanent Court.

That is why, to re-emphasize the language of the dissent, and I quote again: "The words still in force refer to the declarations themselves, to a period of time limited or unlimited which has expired." But why, one asks, does one spend so much time on the *Aerial Incident* dissent? The majority after all did not accept these views. It evidences no such large and generous conception of the compulsory jurisdiction of the Court. Its approach, in the words of the United States Observations in that case, was "technical and conceptual", such as would "defeat the constructive purpose of revision of the new Statute".

Fortunately, the Court has not adhered to any such niggardly vision in subsequent cases dealing with the transition from the Permanent Court to the International Court of Justice. It is true, of course, that neither the *Temple of Preah Vihear* decision nor *Barcelona Traction* expressly overrules *Aerial Incident*, but the holding in that case has been confined to its facts. The underlying rationale in both the later cases adopts wholeheartedly the principles espoused by the dissenters in *Aerial Incident*.

In *Barcelona Traction*, as the Court knows, it was held that a clause in a 1927 treaty between Spain and Belgium, providing for jurisdiction in the Permanent Court, was effective to vest jurisdiction in the present Court, under Article 37 of the Statute, after Spain became a member of the United Nations in 1955. In contrast to the Bulgarian case, the lapse of nine years after the dissolution of the Permanent Court was found not to vitiate the jurisdictional claim.

One may speculate on the reasons why the Court reconsidered the underlying principles governing the construction of the transitional articles. There seems little doubt, for example, that in *Barcelona Traction* the Court saw that its approach to these provisions was a matter of wide significance, rather than a narrow and limited point, as the majority seemed to assume in *Aerial Incident*. Nevertheless, the net effect is clear. *Barcelona Traction*, says Dr. Rosenne in his authoritative work,

> "reached conclusions which may be regarded as reversing the principles applied in 1959 in the *Aerial Incident* case, and there is little doubt that in doing so the Court was influenced by significant considerations of public policy, since it recognized that, whatever it might be, its decision would be liable to have far-reaching effects contrary to the position in the 1959 case".

Judge Tanaka makes the same point even more directly in his separate opinion in *Barcelona Traction*. He criticizes the Court for not facing up to this issue squarely and overruling its *Aerial Incident* decision. But, he goes on to say:

> "The Court's opinion, although it rests on the difference between the two provisions, is not limited to points peculiar to the interpretation of Article 37. Its essential reason can be *mutatis mutandis* applied to the interpretation of Article 36, paragraph 5. Furthermore, I assume the Court's opinion is, in its fundamental reasoning, not very far from that of the Joint Dissenting Opinion in the *Aerial Incident* case. The above-cited passage from the Court's reasoning may be regarded as precisely the antithesis or refutation of what was declared in the essential part of the reasoning in the Judgment in the *Aerial Incident* case.
>
> I consider that the Court's emphasis on the difference between Article 36, paragraph 5, and Article 37 is more apparent than real. The Court has been careful not to deal directly with the 1959 Judgment, but the viewpoint adopted by the Court in 1959 is substantially overruled by the present Judgment." (*I.C.J. Reports 1964*, p. 77.)

That is Judge Tanaka speaking in *Barcelona Traction*.

In the light of the principles firmly established in *Barcelona Traction* — principles mandating a broad and hospitable interpretation of the transitional provisions of the Statute — there is little doubt that Article 36 (5) must be construed to cover Nicaragua's unexpired declaration.

THE PRACTICE UNDER ARTICLE 36 (5)

I turn now to the matter of the practice of the Parties and other relevant actors with respect to the Nicaraguan declaration. This practice is significant on the question of jurisdiction in two somewhat different ways.

In the first place, it is evidence of the correct interpretation of Article 36 (5). It is this aspect of the practice that I treat in the next part of my argument. And I will show that it fully supports the interpretation of Article 36 (5) asserted by Nicaragua in this case, namely that Nicaragua is deemed to have accepted the compulsory jurisdiction of the Court by the operation of that Article, properly applied.

But practice has another dimension. It constitutes conduct of the parties, and as such can provide an entirely independent basis for legal obligation. It is this aspect that will be developed in detail by Professor Brownlie when he addresses the Court.

I shall not review the extensive summary of the practice under Article 36 (5) that is set forth in the Memorial (**I**) at paragraphs 20 to 83. However, there are certain matters as to which, it seems to me, the United States has not been altogether exact in its exposition and characterization. As to these matters, I feel some obligation to correct the record. The items I will touch on are four:

(1) The practice of the Court, particularly the first *Yearbook* of the Court.
(2) The case of the *Arbitral Award of the King of Spain*.
(3) The writings of publicists — in particular, Judge Hudson.
(4) The practice of the United States.

The Court adjourned from 4.26 p.m. to 4.42 p.m.

Mr. President and Members of the Court, when we recessed I was just beginning my discussion of the practice under Article 36 (5), and I want to turn your attention first to the *Yearbooks* of the Court and particularly the first *Yearbook* of the International Court of Justice.

1. The First Yearbook *of the International Court of Justice*

It is an indisputable fact that every *Yearbook* of the International Court of Justice, from 1946-1947 to date, has listed Nicaragua among the States that have accepted the compulsory jurisdiction of the Court. Professor Brownlie, tomorrow, will develop the legal significance of that unbroken course of conduct.

Both the Memorial and the Counter Memorial, however, recognize that, in the interpretation of Article 36 (5), great weight must be accorded to the actions of the Registrar of the new Court in compiling the very first *Yearbook* of the Court. His actions at that time are especially significant because they reflect the contemporaneous understanding of the meaning of the Statute.

The Counter-Memorial (**II**) says, at paragraph 127: "taken as a whole, the first *Yearbook* did *not* treat Nicaragua as a State bound to the Court's compulsory jurisdiction by reason of its 1929 declaration." I must say I find that statement simply astonishing. Nicaragua is listed as subject to the compulsory jurisdiction of the Court in that first *Yearbook* not once, but three different times. The entries are set out in detail at paragraphs 41-45 of the Memorial (**I**).

The United States treatment of the first *Yearbook* is remarkable in another way. It appears under the heading in the Counter-Memorial (**II**): "Article 36 (5) Has Been Applied Only to States that Had Accepted the Permanent Court's Compulsory Jurisdiction". Yet the Counter-Memorial recognizes at the outset, as it must, that the *Yearbook did* apply Article 36 (5) to a State, Nicaragua, that the United States asserts did not accept the compulsory jurisdiction of the Permanent Court. And recall, not once, but in three separate places. And at page 111, in the first *Yearbook*, it is stated expressly with regard to Nicaragua: "Declaration made under Article 36 of the Permanent Court and deemed to be still in force. (Article 36 (5) of the Statute of the Permanent Court)."

The Counter-Memorial asserts that Nicaragua's declaration was legally identical with 20 other declarations of States that had not accepted the jurisdiction of the Permanent Court and were not listed by the Registrar as bound to accept the jurisdiction of this Court (**II**, Counter-Memorial, para. 86). With deference, that simply begs the question. The very point at issue is whether the Registrar's distinction between Nicaragua and the other 20 is well founded in law. Assertion will not establish the point. Examination of the facts will.

Nicaragua's Memorial shows the basis on which each of the declarations in question were properly distinguished from that of Nicaragua (**I**, Memorial, para. 48). The Counter-Memorial (**II**, para. 86) does not contest the great bulk of those instances. Let us turn to the remaining two — Turkey and Costa Rica — on which the United States claim of "legal identity" must finally rest.

The Counter-Memorial, like the Memorial, recognizes that the treatment of Turkey and Costa Rica in moving from the last *Yearbook* of the Permanent Court to the first *Yearbook* of the present Court is crucial in determining the interpretation of Article 36 (5) on which the Registrar was acting. (Counter-Memorial, paras. 89-92; Memorial, para. 48.) The three States were listed together in the last *Yearbook* of the old Court as States that signed the Optional Clause "without condition as to ratification but had not ratified the Protocol of Signature of the Statute" (*P.C.I.J. Yearbook 1939-1945*, p. 50).

In its Memorial, Nicaragua states:

> "The declaration of Turkey, for a definite term, had expired: that of Costa Rica was considered extinguished when Costa Rica withdrew from the League of Nations and renounced its obligations thereunder, including its declaration under the Optional Clause." (**I**, Memorial, para. 48.)

The United States, however, asserts that the status of these two States "under the Permanent Court was essentially identical to Nicaragua's" (**II**, Counter-Memorial, para. 89). The contention is that the failure to treat Nicaragua in the same way as the other two that is to deny its standing under Article 36 (5) of the present Statute must be attributed to some error or confusion on the part of the Registrar. The United States is mistaken. Careful analysis of the situation of the two countries in question shows that they were properly classified by the Registrar as not falling within the purview of Article 36 (5).

As to Costa Rica, the United States asks why, if its declaration was extinguished when it withdrew from the League, should not Nicaragua's have suffered the same fate when it withdrew from the League in 1938? The answer is simple. Under Article 35 of the Statute of the Permanent Court, the Court was open only "to Members of the League and also to States mentioned in the Annex to the Covenant". The Annex includes signatories of the peace treaty and States invited to accede to the Covenant. Nicaragua, as a signatory to the peace treaty, was "mentioned in the Annex". Costa Rica was not. Thus, after Costa Rica withdrew from the League, the Court was no longer open to it, and its declaration, though in terms unlimited, was in fact a nullity. When the Statute of the present Court came into effect in 1945, there was nothing with respect to Costa Rica for Article 36 (5) to operate on.

Nicaragua, however, was a signatory to the peace treaty, and was "mentioned in the Annex", and so, even after it withdrew from the League, the Court under the terms of Article 35 of its Statute was still open to it. Nicaragua understood that its withdrawal from the League did not affect its declaration under the Optional Clause, because in November 1939, after the withdrawal, it sent the telegram to the Registrar of the Court notifying him of its ratification of the Protocol. Thus, unlike Costa Rica, its declaration remained operative despite its withdrawal from the League, needing only the ratification of the Statute of the Court to perfect it. This requirement, as Nicaragua's Memorial shows, was supplied by the deposit of a formal instrument of ratification of the Statute of the present Court and the operation of Article 36 (5) of its Statute (**I**, Memorial, para. 49).

Turkey made a declaration in 1936 for a term of five years. The United States argues that under the practice of the Permanent Court, such declarations began to run from the date when the acceptance of jurisdiction became fully effective, not the date of the declaration. Thus, says the United States, at the time the Statute of the present Court came into force, the Turkish declaration still had five years to run, and, on Nicaragua's theory, it should have been brought into effect by Turkey's ratification of the United Nations Charter (**II**, Counter-Memorial, paras. 91-98).

It is by no means clear that the practice of the Permanent Court was what the United States claims it was, or that the explanation of any such practice is the one proffered by the United States. But in any event, as the Counter-Memorial admits, the practice was not followed where "the declaration specified otherwise" (**II**, Counter-Memorial, para. 92). The Turkish declaration, made on 12 March 1936, did so specify. It recognized the Court's jurisdiction "for a period of five years, in any of the disputes enumerated in the said Article 36 (2), arising after the signature of the present declaration" (*P.C.I.J. Yearbook 1935-1936*, p. 335). By the terms of the declaration, therefore, the five-year period began to run from the date of signature. Thus, as Nicaragua stated in its Memorial, the Turkish declaration had expired by its terms when Turkey joined the United Nations. It was therefore properly classified by the Registrar of the present Court as not coming within the scope of Article 36 (5). Indeed, the United States itself recognized, in its Memorial in the *Aerial Incident* case, that the declaration of Turkey had expired according to its terms before Turkey ratified the United Nations Charter. (*I.C.J. Pleadings*, p. 320.) See also Judge Hudson's article, "The Twenty-Sixth Year of the World Court" (42 *AJIL*, p. 10), where he says: "The Turkish declaration of March 12, 1936, had expired according to its terms."

The statement in Nicaragua's Memorial thus gains additional strength from the analysis of the two asserted counter-examples, Turkey and Nicaragua, put forward by the United States. In our Memorial we said:

> "The care and deliberation of the compilers of the *Yearbook* is confirmed by a detailed comparison of the treatment given in the last *Yearbook* of the Permanent Court and the first *Yearbook* of the present Court to other States that had made declarations under the Optional Clause." (**I**, Memorial, para. 48.)

Nicaragua stands on that statement.

2. *The Case of the* Arbitral Award Made by the King of Spain on 23 December 1906

Now I would like to turn to the case of the *Arbitral Award of the King of Spain*. The United States asserts that, with respect to the *Arbitral Award Made by the King of Spain* case, decided by the Court in 1960:

> "Nicaragua, Honduras and the United States all believed and acted on the premise that Nicaragua's 1929 declaration was not a binding acceptance of the present Court's jurisdiction." (**II**, Counter-Memorial, para. 113.)

As I shall show, that statement is incorrect as to all three countries. The error is apparent on the face of the documents the United States submitted to the Court (**II**, Counter-Memorial, Anns. 34-37). It emerges even more clearly, in some aspects, from documents that were available to the United States, that it *must* have reviewed in preparing its Counter-Memorial, but that it chose not to disclose to the Court.

With the Court's permission, I will now examine this documentation in detail. First:

Honduras

The complete answer to the United States contention with respect to Honduras remember the contention is that Honduras at all times believed and acted on the premise that Nicaragua's declaration was not binding is found in a letter from Jorge Fidel Duron, Foreign Minister of Honduras, to Judge Hudson, dated 13 September 1957. You will find it in our Exhibit B, item 12 (*infra*, pp. 305-307). This letter is found in the same file of Judge Hudson's papers as the documents presented to the Court in Annexes 35-37 of the Counter-Memorial (**II**). For some reason the United States thought it unnecessary to present this document to the Court. The Duron letter states:

> "Dr. Cruz [the Honduran Agent] and I want to insist that the Solemn Agreement of July 21, 1957 [the compromis] only reinforces and fortifies

> the arguments contained in your Memorial to establish the jurisdiction of the Court. Both the Agreement signed by the two Foreign Ministers and the Agreements signed also with the OAS do not modify in any way our position except reaffirming and recognizing said jurisdiction."

And now here is the critical point:

> "*Time and again our Delegation before the Organization of American States reiterated that the two countries had submitted to the jurisdiction of the International Court and that Honduras without prior agreement could bring Nicaragua into the Court to force her to comply with her international obligations.*"

And then he continues:

> "The Special Agreement was signed at the insistence of Dr. Luis Quintanilla who stated that such a pact gave it more force in guaranteeing the execution of the Court's decision by virtue of the intervention of the Organization. He even went so far as to insinuate that we could find difficulties at the Security Council in view of possible political pressure and, without mentioning, intimated the possibility of a veto even." (Exhibit B, 12, *infra*, p. 306, para. 3 (emphasis added).)

Now that passage is simply an expansion of the same point made a month earlier in a letter from Duron to Hudson on 24 August 1957, which is also omitted from the United States Annexes. Here is a quotation from that letter:

> "We believe and recommend that your arguments about the jurisdiction of the Court should be maintained as stated in the Application and in the Memorial because, *regardless of the Act of 21 July 1957, legally both States were subject to the competency of the Court and your sound arguments fortify our position.* You are right in saying that this Act takes care of the question of jurisdiction but we submit that your allegation be kept in both documents (i.e., the Application and Memorial) only to be reinforced by the Act." (Exhibit B, 11, *infra*, p. 304, para. 3 (emphasis added).)

Thus, even after the Washington Agreement was signed, Honduras insisted that Nicaragua was subject to the Court's compulsory jurisdiction, and that this position must be maintained in the Pleadings filed with the Court in the *King of Spain* case.

Dr. Charles De Visscher, also among counsel to Honduras in the case, appears to have had doubts whether the reference to the Optional Clause as a title of jurisdiction had to be retained in the Honduran Memorial. Dr. Ramon Cruz, the Agent of Honduras, asked Hudson to intervene with De Visscher to ensure that the reference was maintained. Judge Hudson did so, and apparently convinced De Visscher. The correspondence is to be found in our Exhibit B, documents 13, 14, 15 and 16. And of course, the Application and Memorial as filed corresponded to these instructions.

Honduras, almost from the beginning of its discussions with Judge Hudson, never deviated from the position that Nicaragua was subject to the Optional Clause, even in the face of questions and caveats raised by Hudson.

Although at the very outset, Foreign Minister Mendoza (he was Foreign Minister before Duron) may have entertained doubts on the matter (see II, Counter-Memorial, Ann. 34, Apps. F and C), these were soon resolved. On 9 May and again on 18 May 1956, that is less than six months after he first consulted Hudson, he wrote to Hudson concluding that the Nicaraguan declaration of 24 September 1929 was in full force and effect:

> "Dr. Davila . . . and I are of the opinion that with these documents [they were the *Gaceta* entries] we have a sure basis on which to establish the jurisdiction and competency of the International Court of Justice to resolve the petition which Honduras is to present against Nicaragua."

That is item 3 of our Exhibit B (*infra*, pp. 297-298) and further correspondence, including Judge Hudson's objections and Mendoza's responses, may be found in Exhibit B, items 7-10 (*infra*, pp. 300-303).

Now, why then, if Honduras was convinced that Nicaragua had submitted to the compulsory jurisdiction of the Court, did Honduras not move promptly to bring its case against Nicaragua by Application, instead of waiting for the *compromis* in the Washington Agreement of 21 July 1957? The United States professes to find such hesitation inexplicable. It says, "the only reasonable inference to be drawn . . . is that responsible officials within Honduras did not believe Nicaragua would appear in the absence of a special agreement conferring jurisdiction on the Court" (Counter-Memorial, Ann. 34, II, p. 220). But the reason is quite clear: Honduras was concerned about *the terms of reference* under which the dispute would be submitted for adjudication. Its position was that the King's award was valid. The only remaining open issue was the execution of the award. It did not want to take any step toward adjudication that might imply doubts or questions about the validity of the award. It was concerned that a plenary submission in an action based on Article 36 (2) would carry such an implication.

Nicaragua, on the other hand, took the position that the award was null and void. It insisted that any judicial proceedings must be structured in a way that permitted it to raise the question of validity *vel non*.

There is nothing arcane or obscure about this explanation. It appears on the face of the documentation submitted by the United States. A despatch from the United States Embassy in Nicaragua dated 24 January 1956 sets forth the positions of the two countries with admirable clarity:

> "Honduras contends that the Award is a 'perfect, binding and perpetual Treaty' and that the only question remaining is that of where the border runs under the Award. According to the Honduran Foreign Minister's reported statements, as reported by the Department [the State Department] and Tegucigalpa [the Embassy in Honduras], *Honduras cannot go to the International Court of Justice except on the basis that the Award is valid*. . . .
>
> Nicaragua's position is that the award is null . . . *Consequently it cannot accept Honduras' position of going to the International Court on the basis that it is valid*. For Nicaragua, the dispute presently is not as to where the undefined border may lie but whether the Arbitral Award of the King of Spain is valid or null." (Counter-Memorial, Ann. 34, App. I, II, p. 236 (emphasis added).)

The despatch concludes that the positions of the two countries are "irreconcilable". It goes on to suggest a solution that foreshadows the compromise ultimately reached in the Washington Agreement: an agreed submission that would permit each party to maintain its position before the Court "without any so-called loss of dignity by Honduras" (*ibid.*).

This same theme appears again and again in the diplomatic materials. It was certainly well understood by the United States officials concerned. Consider, for example, Foreign Minister Mendoza's conversation with Assistant Secretary Holland of 19 December 1955, at the very beginning of this affair. This is the very talk in which Dr. Mendoza is reported as expressing doubts about

Nicaragua's acceptance of the compulsory jurisdiction. He goes on to explain, however, the true reason for Honduras's hesitancy to invoke the Court:

> "Dr. Mendoza was emphatic that the dispute could not be referred to the ICJ [Dr. Mendoza is the Honduran Foreign Minister] on the basis that the latter should determine whether or not the award of the King of Spain was valid. Since the Nicaraguans maintained that the award was null and void this procedure would of course be agreeable to them. On the other hand, were the Hondurans to agree to such a proposition it would indicate that they had some doubt as to the validity of the award and the Hondurans had none." (Counter-Memorial, Ann. 34, App. F, II, pp. 232-233.)

Similarly, an instruction from the Department of State to the Embassy in Managua concerning possible resolution of the dispute by the International Court of Justice states:

> "The Honduran representatives have made it clear that Honduras would not be willing to submit the question of the validity of the decision rendered by the King of Spain in 1906 since they maintain there is no question but that the decision is valid. They do not wish to weaken their position by even suggesting that this is a matter for decision by the Court." (Ann. 34, App. H, of the Counter-Memorial.)

Of course, a plenary action by Honduras under Article 36 (2) would have put in issue the validity of the award as a matter of affirmative pleading by Honduras. Honduras would also bear the burden of proof on the issue. This was the very thing Honduras did not want to do. For other examples in the Appendices to Annex 34, illustrating this point, see Appendix C, II, pages 229-230; Appendix J, page 235; Appendix K, page 237; Appendix M, page 241; Appendix O, pages 243-244; Appendix P, page 247 (Nicaragua "cannot accept the assertion that the only solution to the matter in conformity with international law is execution of the arbitral award"); and Appendix S. All of them contain clear statements of the terms of reference problem.

Of course, Honduras recognized that once the case got to the Court, on whatever basis, Nicaragua would be able to argue that the Award was invalid. Honduras simply did not want to be in the position of itself seeming to raise the validity issue. The point may seem to be of little practical significance. But it is just such questions of "dignity" and "face" that are the stuff of diplomacy. Indeed, it was just such considerations that led to the submission of the case of *Minquiers and Ecrehos* by a special agreement, although France and England were both undoubtedly subject to the compulsory jurisdiction (*I.C.J. Reports 1953*, p. 47).

The Washington Agreement embodied the kind of formula for which the parties had been searching. The two Governments agreed to submit to the Court "the dispute existing between them with respect to the Arbitral Award handed down by His Majesty the King of Spain on 23 December 1906 . . .". The Agreement recites the understanding that each party "shall present such facets of the matter in disagreement as it deems pertinent". The "dispute" is not further defined or characterized, so that each party can maintain its own position. Indeed, each party appended to the Agreement an Annex setting out its position in full. You can see the Agreement and the Annexes in the pleadings to the *King of Spain* decision (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, pp. 27-30).

It should be noted that Judge Hudson's correspondence reveals another reason why the device of the *compromis* commended itself to Honduras. Foreign Minister

Duron states that the "Special Agreement was signed at the insistence of Dr. Luis Quintanilla". Dr. Quintanilla was then the Mexican representative to the OAS Council — an important person for both Honduras and Nicaragua — and was also the Vice-President of the *Ad Hoc* Committee that oversaw the negotiations for the settlement. Dr. Quintanilla thought "that such a pact gave it more force in guaranteeing the execution of the Court's decision by virtue of the intervention of the Organization of American States". That is again the letter I quoted earlier (Exhibit B, item 12, *infra*, p. 306, para. 3).

In sum, the assertion that "Honduras believed . . . and acted on the premise that Nicaragua's 1929 declaration was not a binding acceptance of the present Court's jurisdiction" that is the United States assertion (**II**, Counter-Memorial, para. 113) is palpably incorrect. There may have been doubts at some times. And certainly the theory on which Honduras maintained that jurisdiction existed is not the theory advanced here by Nicaragua. But as to the fact of the Honduran position, there can be no doubt whatsoever: Honduras asserted from the outset that Nicaragua was subject to the compulsory jurisdiction of the Court; it insisted that this title of jurisdiction should be relied on in the case to be brought; and it *was* relied on in the Application and Memorial ultimately filed. The reason Honduras did not proceed earlier or solely in reliance on Article 36 (2) was not lack of confidence in the legal position, but the political and diplomatic difficulties such a course might entail.

Nicaragua

The documents submitted by the United States do not show any denial by Nicaragua that it is subject to the jurisdiction of the Court. On the contrary, although they reflect a good deal of diplomatic manœuvring, they are replete with expressions of Nicaragua's willingness to have the dispute settled in this manner. For example, the United States Embassy in Managua reports that

> "Oscar Sevilla Sacasa, the Foreign Minister, reaffirmed on May 27, 1955, Nicaragua's willingness to submit to the International Court of Justice the question of the undefined sector of the Nicaraguan-Honduran border" (**II**, Counter-Memorial, Ann. 34, App. I).

And again

> "Ambassador Sevilla Sacasa indicated that his Government was definitely interested in presenting the matter to the International Court on a basis which would not reflect on the dignity of either of the participants" (*ibid.*, App. H).

Again, the problem seems to be the terms of reference. This appears most clearly in the very conversation cited by the United States as an admission by Nicaragua that it is not subject to the compulsory jurisdiction (**II**, Counter-Memorial, para. 116). On close examination of the report of that conversation, it shows nothing of the kind. The document referred to is Appendix K to Annex 34 of the United States Counter-Memorial (**II**), and if any of the Members of the Court have the Annexes before them, they might wish to follow along on it. By way of preliminary, it should be noted that this is an informal internal record of conversation between Ambassador Sevilla Sacasa and Mr. Newbegin, a rather junior officer in the State Department at the time, prepared by a United States participant, probably Mr. Newbegin himself, for the files. As Ambassador Argüello has already pointed out, it is not a statement of the Nicaraguan Government. In any case, to see the real import of this so-called "admission" attributed to the Nicaraguan Ambassador, the entire context of the statement must be examined.

With the Court's permission, I will read the entire relevant passage from the record of conversation. It begins with Mr. Newbegin's review of the situation as regards submission to the Court in exactly the terms I have discussed above, and this is a rather long passage, so I ask the Court to bear with me:

> "I told the Ambassador that the Hondurans felt that the best means of settling the dispute would be through reference to the International Court of Justice. The only reservation the Hondurans had in this connection was the question of terms of reference, namely, the Hondurans did not wish to refer to the Court the question of whether or not the Award of the King of Spain in 1906 was valid. They recognized that once the question was referred to the Court the matter of the award would undoubtedly be passed on by the Court and they had no objection to this. It was purely a matter of terms of reference. The Hondurans would not agree to submitting the case to the Court on the basis of merely determining the validity of the award. If they did this they felt that that act itself would indicate that they had some question of its validity while in fact they had none. They recognized at the same time that Nicaragua would wish the matter referred to the Court on exactly that basis since Nicaragua was maintaining that the award was null and void and accordingly the boundary line was still a matter of dispute. The Hondurans had suggested that either Honduras or Nicaragua could make a complaint to the Court that the other was occupying certain territory or some other grounds of complaint might be found. Alternatively, they could find some terms of reference on which they would both agree but which would require a decision by the Court. Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.
>
> Ambassador Sevilla Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty."

The Counter-Memorial (**II**, para. 116), and not only the Counter-Memorial but the much larger Memorandum — an 11- or 12-page Memorandum discussing this matter (Ann. 34, **II**, p. 224) — quote only one sentence from Mr. Newbegin's presentation — *only the last sentence referring to Nicaragua's acceptance of the compulsory jurisdiction*. If you quote only that sentence and then Ambassador Sevilla Sacasa's reply, it is made to appear that his remark was a direct response to the assertion that Nicaragua had not accepted compulsory jurisdiction. I submit that read in its full context the remark is at best ambiguous. The much more likely reading is that the difficulty to which the Ambassador referred was the difficulty that was the main subject of the conversation, that is the difficulty over the terms of reference. His comment can be converted into an admission that Nicaragua had not submitted only by the kind of relentlessly selective quotation that the United States has chosen to employ.

The United States further asserts that in the case itself:

> "Nicaragua objected strongly to the invocation of Article 36 (2). According to Nicaragua, the Court's jurisdiction over the case rests exclusively on the Washington Agreement. Nicaragua also argued that the case did not fall within Article 36, paragraph 2 (*c*), which Honduras had cited." (**II**, Counter-Memorial, para. 119.)

Again the United States statement is misleading. The United States cites us to pages 131-132 of Volume I of the *Pleadings* in the *King of Spain* case. Page 131 contains no jurisdictional objection at all — it only insists that the "actual dispute submitted to the Court was defined by the OAS resolution of 5 July 1957", and not by the Honduran statement appended thereto, in which Article 36 is mentioned.

On page 132 the Nicaraguan Memorial challenges the Honduran invocation of Article 36 (2) *(e)*. But the Hondurans do not mention that Article in the jurisdictional averments of their Pleadings, but rather in the Conclusions section of their Application (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, p. 10). As to this, Nicaragua asserted, in line with the position it had maintained all along, that there was no dispute falling within the terms of Article 36 (2) *(e)*:

> "There is no dispute about the *reality* of the existence of any fact which if established, would constitute the breach of an international obligation. There is no dispute as to the reality of Nicaragua's exercise of sovereignty over a part of the territory in litigation; there is a disagreement about the existence of any obligation of Nicaragua to execute a pretended arbitral award . . ." (I, Nicaraguan Memorial, p. 132).

So we see that on pages 131-132, Nicaragua is arguing about the terms of reference again. There is simply nothing in all this that constitutes an objection to jurisdiction under Article 36 (2). Still less is it a denial that Nicaragua has submitted to the Court's jurisdiction under that Article.

Nicaragua's true belief in the premises was affected by another circumstance. In the summer of 1956, six months after Honduras had gone to Judge Hudson, Nicaragua also consulted distinguished counsel about the status of the King of Spain's Award and about what course it should pursue to vindicate its rights in that matter. After an extensive search, the archival copies of the Spanish translations of these extensive consultations have been discovered in Managua. They have been deposited with the Registrar in accordance with Rule 50 (2) of the Rules of Court.

In each consultation, the jurisdictional discussion is only a small part of a much larger opinion dealing with the ultimate validity of the Arbitral Award and the remedies available to Nicaragua. We have obtained a photocopy of the relevant portions of Madame Bastid's opinion in the original French from Madame Bastid herself. And we have supplied both the Spanish and an English translation of the relevant portions of Professor Charles Rousseau's opinion. Those are before the Court as Exhibit C in this proceeding (*infra*, pp. 309-313).

Professor Rousseau delivered his opinion first, in June 1956. He recites the well-known facts of Nicaragua's failure to deposit the instrument of ratification and states that this raises a question about the validity of Nicaragua's adherence to the Optional Clause. But he does not stop to resolve the question. He regards it as "an ambiguity that it is convenient to remove as quickly as possible" by filing a new declaration. (That is at Exhibit C, Professor Rousseau's Opinion, *infra*, pp. 313.) And, of course, when Professor Rousseau came to answer that question in his treatise, he ranged himself with the vast majority who list Nicaragua as bound by the compulsory jurisdiction (Rousseau, *Droit international public*, t. V (Paris, 1988), p. 455).

Madame Bastid, however, who filed her opinion two months later in August analysed the issue fully and asserted unequivocally that Nicaragua was bound:

> "Dans ces conditions on peut soutenir que la déclaration faite par le Nicaragua rentre bien dans la cadre prévu par l'alinéa 5 de l'article 36 actuel. Telle est d'ailleurs la solution qui résulte de l'*Annuaire* de la Cour . . . Sans

> doute n'engage-t-elle pas la Cour, mais elle n'a pu manquer de faire l'objet d'un examen attentif du Greffe.
>
> En conclusion, la compétence obligatoire de la Cour existe pour tous différends énumérés à l'article 36, alinea 2 dans les rapports entre le Honduras et le Nicaragua." (Exhibit C, Bastid Opinion, *infra*, p. 311.)

I should note in passing that Madame Bastid had no difficulty in concluding that Article 36 (5) operated, even though Nicaragua had not deposited its instrument of ratification:

> "Par ailleurs, l'alinéa 5 de l'article 36 du Statut de la Cour internationale parle des déclarations faites en application de l'article 36 du Statut de la Cour permanente, sans exiger qu'elles aient été faites par un Etat partie à ce dernier Statut."

So there is another person who doesn't see the "plain meaning" of Article 36 (5) the way the United States now does.

In any case, from the summer of 1956 on, Nicaragua had unequivocal advice from distinguished foreign counsel that the declaration made by Nicaragua was within the purview of Article 36 (5). It could not, therefore, have "believed and acted on the premise" that its declaration was not a binding acceptance of this Court's jurisdiction. Now let's come to the United States.

United States

The United States assertion that the United States "believed and acted on the premise that Nicaragua's 1929 declaration was not binding . . ." rests on two sentences in the Counter-Memorial:

(1) "Later that same month [December 1955] Honduras apprised the United States of Judge Hudson's conclusions." (**II**, Counter-Memorial, para. 115.)

And the other statement in the next paragraph:

(2) "During the course of conversation with the United States, Nicaragua confirmed to the United States that Nicaragua had *not* accepted the Court's compulsory jurisdiction." (*Ibid.*, para. 116; emphasis in original.)

As to the first, we shall see that Judge Hudson's conclusions were neither unqualified nor unwavering. As to the second, it refers to the Memorandum of Conversation with Ambassador Sevilla Sacasa that I have already analysed and which I have shown does not represent a denial by Nicaragua that it was bound by the compulsory jurisdiction.

The United States has not produced a single considered and deliberate statement by a United States official espousing the view that Nicaragua was not subject to the Court's compulsory jurisdiction. The Court will search Annex 34 and its Appendices in vain for such a statement. It is altogether natural that no such statement should appear. The United States was trying to use its good offices to settle a dispute. It listened sympathetically to the positions and arguments of both parties. At times it repeated the arguments of one to the other. It tried to make sure that each understood the other's position and to help clarify the differences between them. But, in accordance with the cardinal rule of successful mediation, it never espoused the position of either party. To do so would have been to undermine its usefulness as an intermediary.

If we want to find out the official position of the United States, we must look elsewhere. 1956 was the year that *Treaties in Force* was first published. The volume must have been in preparation at the time the conversations reported in the United States Annexes were going forward. Most of the Annexes submitted by the United States reveal on their face that they were circulated to the Office of the Legal Adviser. This is indicated sometimes by the marking "L" along the left hand margin or sometimes by the written notation "L-2" at the top. Some are marked "L/ARA" indicating that they went to the section of the Office of the Legal Adviser dealing with American Republic Affairs. (Annexes J and M to the United States Exhibit are so marked.) The most important, including Judge Hudson's memorandum, went to "L/ARA Miss Whiteman". (See Anns. F, G, H, K.) She was then the Assistant Legal Adviser in charge of that section and is also the author of *Whiteman's Digest*, the authoritative compendium of United States practice on matters of international law. The Legal Adviser's Office and its Treaty Affairs Section are the compilers of *Treaties in Force*.

We are left with an interesting question: If, as the Counter-Memorial asserts, the United States "believed" that Nicaragua had not accepted the compulsory jurisdiction, and if this belief was shared by the State Department lawyers who were the experts in the matter and who had all the facts before them, why did they list Nicaragua as bound, in the first volume of *Treaties in Force*, which they were at that very moment compiling?

To sum up, the United States assertion that "Honduras, Nicaragua and the United States believed and acted on the premise that Nicaragua's 1929 declaration was not a binding acceptance of the present Court's jurisdiction" turns out, upon careful examination of the documentation, most of it supplied by the United States, to be quite simply wrong. Honduras consistently maintained the contrary. Nicaragua never "confirmed that [it] had not accepted the Court's compulsory jurisdiction" and had categorical advice from its own very distinguished Foreign Adviser that it was bound. As for the United States, it kept its own counsel in discussions among the parties, but when it came time to take an official position in its new publication *Treaties in Force*, it recorded Nicaragua as subject to the Optional Clause jurisdiction.

3. Opinions of Publicists

The United States concedes, as it must, that the vast majority of publicists have accepted that Nicaragua is subject to the compulsory jurisdiction of the Court. A list of 13 such authorities is found in paragraph 167 of our Memorial.

The United States counters with Dr. Engel. And we concede that Dr. Engel does indeed argue that Nicaragua was not within the operation of Article 36 (5) (**I**, Memorial, para. 69).

But the United States puts most of its emphasis on the writings of Dr. Rosenne and of Judge Hudson, and I would like to spend a little more time on them.

As to Dr. Rosenne, the United States makes much of asserted qualifications and doubts he expressed with respect to Nicaragua. It is certainly true that Professor Rosenne has progressively distanced himself from personal responsibility for all jurisdictional listings in the successive editions of his book. The Counter-Memorial (para. 145, **II**, p. 45, note 1) quotes the disclaimer, in the 1965 publication, *The Law and Practice of the Court*. But that disclaimer is applicable to all listings. It reflects no special concern about Nicaragua. Similarly, the minor changes in the headings of the footnotes in the various editions of *The World Court* are quoted at length in the Counter-Memorial (para. 145, note 1). If they reflect any change at all in Dr. Rosenne's confidence level, they too are not directed at Nicaragua but apply generally to the States listed in the note. The Counter-Memorial quotes a passage from *The Time Factor in the Jurisdiction of the International Court of Justice* (incidentally without indicating that the passage occurs in a footnote). The passage contains the traditional recital about Nicaragua's deposit of the instrument of ratification (para. 144). But the Counter-Memorial does *not* refer to the Appendix Tables in the same monograph, entitled: "Declarations Accepting Compulsory Jurisdiction by States Parties to the Protocol of Signature of the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice" (*The Time Factor* . . ., p. 76). There, the declaration of Nicaragua is listed as "entering into force" in "24.9.29" with "duration", "unlimited" and "exclusions", "nil". The only entry in the "remarks" column is a reference to the *King of Spain* case (*ibid.*, p. 81). This unqualified listing was made with full knowledge of the facts about the deposit of the instrument of ratification recited in footnote 1 at page 19 of the same volume, already referred to. Indeed, it may not be amiss to point out, in connection with the proper interpretation of Article 36 (5), that, in this table, Dr. Rosenne records the Nicaraguan declaration as "entering into force" on 24 September 1929. So maybe it was "in force" also when the present Court came into existence.

All this is mostly cavilling. The main point is that Dr. Rosenne, with whatever degree of scholarly fastidiousness he thought appropriate, invariably listed Nicaragua among States that are subject to the compulsory jurisdiction of this Court.

The Counter-Memorial reserves its biggest guns for Judge Manley O. Hudson. Not once, but in two separate places, it includes a detailed analysis of the views of Judge Hudson and particularly of his representation of Honduras in the *King of Spain* case (**II**, Counter-Memorial, paras. 114-115, 139-143). Let us review this analysis.

To begin with, one fact is beyond dispute, and is not disputed. Judge Hudson, like Dr. Rosenne, in every publication concerning the compulsory jurisdiction of the Court from 1948 to his last one in 1957, listed Nicaragua among the countries that had submitted to the compulsory jurisdiction. In fact, as already noted, a statement prepared by Judge Hudson and presented to the Senate Committee considering the United States submission to the compulsory jurisdiction in 1946 lists Nicaragua among those States submitting to the compulsory jurisdiction of this Court. (*Hearings on International Court of Justice, Senate Committee on Foreign Relations, 79th Congress, 2nd Session* (1946), p. 91.)

The Counter-Memorial states with reference to the opinion Judge Hudson prepared for Honduras in the *King of Spain* case: "Judge Hudson concluded that 'Nicaragua . . . is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice'" (Counter-Memorial, para. 142). With respect, this is a misstatement of the conclusion of Judge Hudson's opinion. That opinion appears as Annex 37 of the Counter-Memorial, and again I would ask those Members of the Court who have the Annexes before them to follow it along with me. The Counter-Memorial cites for this proposition paragraph 36 of the Hudson opinion. As will be seen in a moment, paragraph 36 does not embody Judge Hudson's "conclusion". The conclusion appears at the end of the opinion where you would expect it to appear, in paragraph 40 (Ann. 37, **II**, p. 265). It says: "the writer would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction". Indeed, the conclusion was softened by the excision of the words "in the least" from the penultimate draft. The Court will understand that experienced professional lawyers are not often surprised by what courts may do.

Paragraph 36, on which the United States relies, is contained in the earlier, tactical part of the opinion (Ann. 37, **II**, p. 264). It follows a paragraph in which Judge Hudson says that the Court has not pronounced on the question whether

Nicaragua is bound by its declaration, and that "without such determination, it is impossible to say definitely whether or not the Government of Honduras may proceed against the Government of Nicaragua" (Ann. 37, para. 34). The next paragraph begins the consideration of other possible bases of jurisdiction, noting that "for example, the parties might agree upon the dispute's being handled by a Tribunal, *ad hoc*" (*ibid.*, para. 35). Then comes the paragraph cited in the Counter-Memorial. The sentence relied on reads in full:

> "It is also possible that the action should be begun against Nicaragua in spite of the fact that that State is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice."

The paragraph then goes on to discuss the possibilities for prorogatory jurisdiction.

It is clear that this sentence is not the simple declarative statement "Nicaragua is not bound by the compulsory jurisdiction" that the Counter-Memorial tries to make it appear. Again, they have selectively quoted out of the very sentence involved. The relevant words occur in a subordinate clause which is in the subjunctive. The words "in spite of the fact that" carry the meaning "even if". That becomes clear from the context provided by the preceding paragraphs, quoted above, in which Judge Hudson states that he cannot say for certain whether or not the Court will hold Nicaragua bound and turns to the discussion of other expedients in the event it does not.

Third, the Counter-Memorial (**II**) quotes paragraphs 19, 20 and 23 of Judge Hudson's opinion in full, but strangely avoids paragraph 24, in which he considers the problem of Article 36 (5) — the only place where he considers the problem of Article 36 (5). That paragraph, at page 261 of Annex 37, reads as follows:

> "It must be admitted, however, that Nicaragua has continued to figure among the States which have accepted the obligations of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, and hence of the International Court of Justice. To some extent, paragraph 5 of Article 36 of the Statute of the International Court of Justice, seems to be the reason for this. It is not due to action of the League of Nations Secretariat; that Secretariat protected itself by publishing a footnote on the events of 29 November 1939, and the things that followed it. For the most part it is due to the fact that a Secretariat is in the habit of following what a preceding Secretariat had done, and it cannot stop to see whether what has been done ought to have been done. Perhaps this habit of following what a predecessor had done without the predecessor's footnote is responsible for the lack of precision."

Let us examine that paragraph in detail. It begins with a recognition that the continued listing of Nicaragua among the States that have accepted the compulsory jurisdiction of the Court creates a basis on which jurisdiction over Nicaragua might be upheld. Judge Hudson is troubled by this and seeks to explain it. However, the explanation discloses that in this case, his customary meticulousness with respect to actions of the Court and its organs deserted him. Almost every statement in the paragraph reveals a misapprehension about the real state of affairs.

First he says that the treatment is due "to some extent" to the operation of Article 36 (5). But of course, it is entirely due to the operation of that Article, as the listings in the *Yearbooks* reveal. They state unequivocally that Nicaragua is deemed to have accepted the compulsory jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 5, of the Statute.

Next, he misapprehends the action of the League Secretariat. He says that it "protected itself by publishing a footnote". But in fact, the League Secretariat had no need for protection, since it unequivocally listed Nicaragua as among the States *not* bound by the compulsory jurisdiction of the Permanent Court, adding, of course, a footnote detailing the factual background.

Most important of all, he fails to appreciate the action taken by the Registrar of this Court in compiling the first *Yearbook*. He ascribes it to the habit of one Secretariat "following what a preceding Secretariat had done". But the very point is that the Registrar of this Court did not do "what the preceding Secretariat had done". It transferred Nicaragua from the category of States not bound in the *Yearbook* of the Permanent Court to the category of States bound under the new Statute. This can only have been a deliberate decision as to the meaning and operation of Article 36 (5). It is this very action of the Registrar in refusing to follow the usual bureaucratic pattern of doing what one's predecessor has done that is so striking in this case. We do not know what Judge Hudson's opinion would have been if he had clearly understood and focused on this uncharacteristic action of the Registrar.

Finally, the United States Counter-Memorial makes much of the 1955 correspondence between Judge Hudson and the then Registrar of the Court regarding Nicaragua's status (**II**, Counter-Memorial, paras. 114-115). The letters were exchanged in connection with Judge Hudson's representation of Honduras in the *King of Spain* case. Hudson's letter, which is missing from the United States Annexes, apparently expressed some doubt about the operation of Article 36 (5) in Nicaragua's case. I should say that I was not able to find that letter either. The Registrar agreed that it would be "impossible" to say that Nicaragua was bound under Article 36 (5) if it had not ratified the Statute of the Permanent Court.

The significant thing, however, is not the doubts that these men may have expressed privately, but what they said publicly when their official responsibility was engaged. As to this, there can be no doubt. The Registrar continued listing Nicaragua in the *Yearbooks* of the Court as a State that had submitted to the compulsory jurisdiction. If he thought that this was "impossible" on the facts as he then knew them, it would have been his duty to change that listing, as was done in the case of Paraguay in 1960, when the Registrar became convinced that that listing was mistaken. He did not make that change with respect to Nicaragua, so he must have had second thoughts.

As to Judge Hudson, we do not know what opinion he expressed to the Registrar, because we do not have his letter. We do know, however, that the opinion he expressed to his client, Honduras, was highly qualified, to say the least. If on occasion he expressed doubts about Nicaragua's amenability to jurisdiction, at other times he insisted on it. He wrote to De Visscher to ensure that the Article 36 (2) basis of jurisdiction remained in the Honduran Memorial. That is Exhibit B, item 14 (*infra*, pp. 307-308). He wrote to Dr. Cruz, the Honduran Agent: "I strongly advise that the jurisdictional provisions of the brief that you carried with you be kept." That was the brief that included references to Article 36 (2). Then he says: "There is some doubt in my mind about the Agreement of 21 July 1957. I wish the doubt to be expiated by the text as we have it." (Exhibit B, item 15, *infra*, p. 308).

And we do know that until the end of his scholarly career he listed Nicaragua in his publications as bound by the compulsory jurisdiction. The Counter-Memorial notes that this treatment of Nicaragua is continued in Judge Hudson's last annual article on the Court, in 1957, when he was in full possession of all the relevant facts. The Counter-Memorial suggests that this renewed expression of an opinion Judge Hudson had held and published all his life was done "perhaps out of deference to his client Honduras" (para. 143). If the Court will permit a personal expression, for me, it is most regrettable that the United States should have found it necessary to cast this aspersion on this distinguished international jurist and scholar.

4. *United States Practice*

Now finally I want to talk about United States practice. It remains only to consider the subsequent practice of the United States since 1948, when, on the basis of a careful study by Mr. Denys Myers of the Legal Adviser's Treaty Affairs Staff, a list was prepared of States subject to the compulsory jurisdiction of the Court. Presumably, the study was precipitated by the declaration of the United States the previous year. Nicaragua was included on the list (**I**, Memorial, para. 81).

As we know, from that day to this, Nicaragua has always appeared in whatever official public record the United States has maintained of States so bound (*ibid.*, paras. 81-82). From 1956, when the State Department first published *Treaties in Force* to the present, Nicaragua has been listed in that publication as accepting the compulsory jurisdiction of the Court (*ibid.*, para. 80).

The United States is uncharacteristically modest about the significance to be attributed to this annual publication. The Counter-Memorial states:

> "*Treaties in Force* should not be considered authoritative or admissible evidence of the text or parties to a multilateral treaty for which the United States is not depositary; that role is reserved for other publications, none of which has ever listed States accepting this Court's compulsory jurisdiction." (**II**, Counter-Memorial, para. 146.)

To begin with, no such disclaimer appears in the publication itself. It recites on its cover page that it is "Compiled by the Treaty Affairs Staff, Office of the Legal Adviser, Department of State". The foreword (which has appeared in substantially the same form since the first publication in 1956) states:

> "This publication contains a list of treaties and other international agreements to which the United States has become a party and which are carried on the records of the Department of State as being in force on January 1 [of the year of publication]. It includes those treaties and other agreements which on that date had not expired by their terms or had not been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated." (*Treaties in Force. A List of Treaties and Other International Agreements in Force on January 1, 1983*, US Dept. of State Publication 9351, 1983.)

The foreword also contains a section entitled "Status of Treaties and Other Agreements", which qualifies the accuracy of the compilation in two respects and two respects only. First:

> "the Department has not undertaken to pass upon the question of the extent to which a state of war between the United States and any foreign country has affected the operation of treaty provisions".

That is one qualification, "state of war". Second:

> "In the case of new countries, the absence of a listing for the country, or

> the absence of any particular treaty, should not be regarded as an absolute determination that a certain treaty or certain treaties are not in force." (*Treaties in Force* . . . . ., 1983.)

These are the only reservations or caveats expressed as to the accuracy of the "determinations" that's the State Department's word the determinations recorded in *Treaties in Force*. There is certainly no distinction made as to "a multilateral treaty for which the United States is not a depository", as the Counter-Memorial suggests.

The Counter-Memorial refers to two publications, *Treaties and Other International Agreements*, "*TIAS*" we call it in the United States, and *United States Treaties and Other International Agreements*, "*UST*", we call it, as the authoritative publications for the "text or parties" to such treaties (Counter-Memorial, para. 146, and note 4). It is true that those publications are the official sources for the texts of treaties and agreements to which the United States became a party in the year of publication. They also contain information concerning the formalities of United States ratification of the treaty and a list of original signatories.

But neither *TIAS* nor *UST* discloses what States are parties to such treaties or indeed whether a particular treaty is still in force, even as to the United States. These publications could not perform those functions, since they consist only of a chronological reproduction of the texts of treaties and agreements that the United States entered into in a particular year. Thus, the Counter-Memorial is simply wrong to suggest that *TIAS* and *UST* are the official source, or any kind of a source, of the parties to treaties to which the United States has adhered. It is true that neither *TIAS* nor *UST* "has ever listed States accepting this Court's compulsory jurisdiction" (**II**, Counter-Memorial, para. 146). But that is because they have never listed the parties to any treaty whatsoever. That function is performed by *Treaties in Force*.

It is not surprising, then, that *Treaties in Force* is routinely cited by United States courts as evidencing that a particular treaty is in force or that a particular State is a party to it. I will mention only a few instances from the official reports of Supreme Court decisions.

The most recent is *Volkswagenwerk A.G.* v. *Falzon*, decided in 1983. There the court cited *Treaties in Force* as the sole evidence for the proposition that the United States and the Federal Republic of Germany are currently parties to the Convention on Taking of Evidence Abroad in Civil or Commercial Matters and I do not think that is a treaty of which the United States is a depositary (103 S. Ct. 1810, 1983).

In *United States* v. *First National City Bank*, Justice Harlan in dissent used *Treaties in Force* as the sole evidence for the fact that there was no subsisting tax treaty between the United States and Uruguay (379 US 378, p. 396, n. 16, 1965).

In *United States* v. *California*, the United States cited *Treaties in Force* as authority that the Convention on the Territorial Sea and the Contiguous Zone was approved by the Senate and ratified by the President of the United States (381 US 139, p. 165, n. 32, 1965). There is a matter for which they could have referred to *UST*, but didn't, and that again is a multilateral treaty for which the United States is not the depositary.

In *Roth* v. *United States*, the Supreme Court relied on the very first edition of *Treaties in Force* as evidence that over 50 States are parties to the Agreement for the Suppression of the Circulation of Obscene Publications, again, a multilateral treaty for which I doubt the United States is the depositary (354 US 476, p. 485, n. 15, 1957).

I will not burden the Court with further instances. We have compiled a list of some 16 cases decided by Federal Courts of Appeals and District Courts in recent years in which *Treaties in Force* has been cited as authoritative evidence for the status of or parties to treaties to which the United States is a party. The treaties referred to range from the United Nations and OAS Charters to the Convention for the Protection of Industrial Property to Bilateral Air Transport Service Agreements. And the States involved range from Angola and Iceland to Canada and the United Kingdom. That list of citations appears at Exhibit D, and I am informed that the reports of the United States courts to which it refers are available in the Library of the Court.

Indeed, in its own Counter-Memorial, in this case, the United States cites *Treaties in Force* for the proposition that certain Central American States are parties to the United Nations Charter, the OAS Charter, etc., although there is a curious introductory sentence qualifying the footnote, that I am confident has never before appeared in a brief filed by an attorney representing the United States (II, Counter-Memorial, para. 279, note 1).

But whether or not *Treaties in Force* is to be regarded as conclusive on the legal status of any of the matters recorded in it, it surely does represent the official position of the United States Government as of the date of publication, as to the status and parties of the treaties and agreements listed therein. As such, it is appropriate evidence of the practice of the United States with respect to its treaty obligations.

The official position of the United States — its unbroken practice as evidenced by *Treaties in Force* and predecessor publications since it adhered to the compulsory jurisdiction of the Court in 1946 — is that Nicaragua has accepted the compulsory jurisdiction of the Court under Article 36 (2) and (5).

Mr. President, Members of the Court, that concludes my presentation.

I submit, on behalf of Nicaragua, that under Article 36 (5) of the Statute of the Court — properly interpreted in the light of its text, the *travaux préparatoires*, the jurisprudence of the Court and the practice under the Article — Nicaragua "must be deemed . . . to have accepted the compulsory jurisdiction of the International Court of Justice . . .".

The Court rose at 6 p.m.

SEVENTH PUBLIC SITTING (9 X 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor **BROWNLIE**: Mr. President, Members of the Court. May it please the Court.

At this stage in the oral presentation of Nicaragua's case my purpose is to maintain and develop the following propositions.

First, the application of the provisions of Article 36 (5) of the Statute of the Court to Nicaragua's declaration of 24 September 1929 and the consequent status of that acceptance as a valid acceptance of the jurisdiction of this Court have been recognized and confirmed as a result of the conduct of the Parties over a period of 38 years.

Second, the status of Nicaragua's declaration of 1929 as a valid acceptance of the jurisdiction of the Court has been recognized and confirmed by the conduct of third States and in a series of important public documents.

Third, the United States letter of 6 April 1984 was an invalid attempt to modify or terminate the existing United States declaration, which has been neither varied nor terminated and remains in force.

Fourth, in the alternative, if the United States letter of 6 April 1984 had the effect of terminating the United States declaration, that termination could only take effect six months after notice.

Fifth, the view espoused by the United States to the effect that the declaration of Nicaragua is terminable without notice and that consequently the principle of reciprocity applies in order to justify unilateral modification of the United States declaration has no legal basis.

Sixth and last, it follows that both the declaration of the United States and that of Nicaragua were valid declarations recognizing as compulsory the jurisdiction of the Court at the date of the Application.

INTRODUCTION: THE PROCEDURAL CONTEXT

Mr. President, before entering the issues of jurisdiction as such, I would like to refer briefly to the procedural context.

The present phase of the case clearly falls within Article 79 of the Rules of Court, which concerns preliminary objections. Paragraph 6 of Article 79 provides that:

> "in order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence which bear on the issue".

Now the United States Counter-Memorial (paras. 9 and 28) asserts that Nicaragua, as Applicant, "bears the burden of demonstrating that the Court has jurisdiction and that its claims are admissible".

That assertion as to the burden of proof in this case is without any justification. No such justification exists in the provisions of the Statute, either in Article 43 or elsewhere. No such justification exists in the Rules of Court. Moreover, the assertion has no relation to what may be called the anatomy of the issues before the Court.

Without labouring the procedural issue too much, I would offer two submissions to the Court on the question of the burden of proof.

The first submission is this. At the most, the procedural position is not less favourable to Nicaragua than it was, for example, to Cambodia in the *Temple of Preah Vihear* case. There the Court decided that, although "from the formal standpoint", Cambodia was the plaintiff, both Cambodia and Thailand had based their respective claims on a series of facts and contentions which were put forward by one party or the other. Consequently, in the words of the Court, "the burden of proof in respect of these will of course lie on the Party asserting or putting them forward" (*I.C.J. Reports 1962*, pp. 15-16). In my contention the situation in the present proceedings is analogous. In this conception, of course, there would be no presumption either for or against the existence of jurisdiction.

But Mr. President, that first submission is by way of a concession, and there is another possible view, which is no less attractive and forms the basis of my second submission on the burden of proof, which is offered in the alternative.

The second submission is this. On the evidence available, both the United States and Nicaragua have declarations in force which recognized the compulsory jurisdiction of the Court within the provisions of Article 36 of the Statute. Thus prima facie both Parties to these proceedings are within the system of the Optional Clause and it is the State which seeks to deny the existence of jurisdiction which has the general burden of proof on that issue.

In relation to both these submissions, two points are of particular relevance. In the first place, the critical date for certain purposes is the date of the Application, 9 April 1984. Until these proceedings the United States had not sought to question the validity of the Nicaraguan declaration. Indeed, as late as 6 April, the date of the attempt to modify the terms of the United States declaration, the United States clearly assumed that an Application by Nicaragua presented a real danger of proceedings on the merits, since, if the Nicaraguan declaration were an evident nullity, there would have been no real point to the letter of 6 April seeking to avoid the suit.

Secondly, the effectiveness of the declaration of Nicaragua as a declaration in force for the purposes of Article 36, paragraph 5, of the Statute is evidenced by a series of public documents and by the conduct of the Parties. The application of Article 36, paragraph 5, to a particular declaration cannot be established on any other basis since there is no pre-ordained process of certification of declarations for this purpose. In consequence, if a series, a pattern, of important public documents, readily available to the parties, or for which one or other party is responsible, indicates the validity of the declaration of the applicant State, there must arise a presumption of legality, which creates a burden of proof for the respondent State.

In the absence of such a process of certification, the evidence of the effectiveness of the declaration of Nicaragua for the purposes of Article 36, paragraph 5, of the Statute inevitably consists of the large mass of public papers covering a span of 38 years, together with the general opinion of States and of authoritative writers.

THE CONDUCT OF THE PARTIES: RECOGNITION OF THE VALIDITY OF NICARAGUA'S DECLARATION

With that preamble behind me, Mr. President, I shall turn to the argument that the validity of Nicaragua's recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties.

This argument consists of four interlocking propositions.

First, Nicaragua's conduct over a period of 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court by way of a recognition of the Application of Article 36, paragraph 5, of the Statute to the Nicaraguan declaration of 1929.

Second, likewise the conduct of the United States over a period of 38 years unequivocally constitutes recognition of the essential validity of the declaration of Nicaragua of 1929 as an acceptance of the compulsory jurisdiction as a result of the Application of Article 36, paragraph 5, of the Statute.

Third, as a consequence it was recognized by both Parties that any formal defect in Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court did not in any way affect the essential validity of Nicaragua's consent to the compulsory jurisdiction of the Court.

Fourth, the essential validity of the Nicaraguan declaration as an acceptance of the compulsory jurisdiction is confirmed by the evidence of a long series of public documents, by the general opinion of States and by the general opinion of qualified publicists.

Consent to Be Bound as Evidenced by Consent

Mr. President, it may assist the Court if I first of all address an issue raised by each of these propositions, namely whether consent which is in some sense implied or informal can constitute consent for the purposes of Article 36 of the Statute. It may be recalled that the United States Counter-Memorial (**II**, paras. 152-156) contends that conduct of the Parties "cannot satisfy the mandatory legal requirements" of the relevant provisions of the Statute (*ibid.*, para. 154).

However, the only mandatory requirement which the Court has insisted upon is the existence of a real consent to the compulsory jurisdiction: I refer to the *Temple of Preah Vihear* case, *Preliminary Objections* (*I.C.J. Reports 1961*, p. 30).

Mr. President, in this case and in international law terms generally, the reference to "conduct of the Parties" involves either a process of interpretation in light of subsequent practice or a process of informal, and in some sense an implied, consent. In the doctrine of private law systems there is no essential difference between express and implied consent, or between express and implied promises. Apart from the case of mandatory requirements of form, in general doctrine an informal or implied promise is just as real, just as important, as an express promise. The focus is normally upon intention, and the only practical difference between express and implied promises lies in the realm of evidence. Moreover, express provisions may be subject to serious ambiguities and to the vice of error and reference may then be made to the conduct of the parties, the course of dealing, the customs of the market, and so forth, in order to solve the problem of interpretation, or to discover the intention of the parties by reference to evidence outside the express terms of the contract.

The Court has always approached the process of discovering the intention of States in relation to acceptance of its jurisdiction in a practical way and within the normal framework of legal technique. Indeed, the Court has in certain respects shown considerable flexibility, particularly in the sphere of *forum* *prorogatum* and I refer, for example, to the *Corfu Channel* case (*I.C.J. Reports 1947-1948*, pp. 27-28).

There can be little doubt that the Court will act upon consent given by implication (cf. *Monetary Gold Removed from Rome in 1943* case, *I.C.J. Reports 1954*, p. 32). And in the *Temple of Preah Vihear* case, *Preliminary Objections* (*I.C.J. Reports 1961*, p. 17), the Court had some very interesting observations to make about the question of formalities with particular reference to the issue of compulsory jurisdiction. The passage concerned is rather long but with your permission, Mr. President, I would like to quote it since it is rather material. In the words of the Court:

> "The Court wishes to refer to the argument presented on behalf of Thailand that, in legal transactions, just as the deed without the intent is not enough, so equally the will without the deed does not suffice to constitute a valid legal transaction. It should be noted here that there was certainly no will on Thailand's part in 1950 to accept the compulsory jurisdiction of the former Permanent Court. This does not of course by itself mean that the 1950 Declaration constituted an acceptance in relation to the present Court. Nevertheless the sheer impossibility that, in 1950, any acceptance could either have been intended, or could in fact have operated, as an acceptance relative to the Permanent Court is a factor to be borne in mind in considering the effect of the 1950 Declaration.
>
> As regards the question of forms and formalities, as distinct from intentions, the Court considers that, to cite examples drawn from the field of private law, there are cases where, for the protection of the interested parties, or for reasons of public policy, or on other grounds, the law prescribes as mandatory certain formalities which, hence, become essential for the validity of certain transactions, such as for instance testamentary dispositions; and another example, amongst many possible ones, would be that of a marriage ceremony. But the position in the cases just mentioned (wills, marriage, etc.) arises because of the existence in those cases of mandatory requirements of law as to forms and formalities. Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.
>
> It is this last position which obtains in the case of acceptances of the compulsory jurisdiction of the Court. The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute. This formality was accomplished by Thailand. For the rest — as regards form — paragraph 2 of Article 36 merely provides that States parties to the Statute 'may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court', etc. The precise form and language in which they do this is left to them, and there is no suggestion that any particular form is required, or that any declarations not in such form will be invalid."

Thus the judgments in the *Temple of Preah Vihear* case.

In that case the Court in fact affirmed the existence of jurisdiction on the basis of a declaration which Thailand was herself seeking to disown and which purported to be a renewal — in 1950 — of the previous declaration — of 1940 — which, of course, related to the jurisdiction of the Permanent Court. Thus both as a question of principle and as a matter of judicial practice, the consent of a State to the compulsory jurisdiction for the purposes of Article 36 of the

Statute can be established on the basis of an implied or informal consent evidenced by the conduct of the Applicant State and in other ways.

The Legal Relevance of Formal Defects in Agreements and Declarations

Mr. President, with your permission I shall examine the legal relevance of formal defects in agreements and declarations of States a little further, more especially because in the present case the United States has placed considerable reliance upon the fact that the instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court appears not to have been deposited. This obviously constitutes a defect of form and is not a matter of the essential validity of the declaration of Nicaragua.

In the Vienna Convention on the Law of Treaties the issue of ratification is classified as an aspect of the "means of expressing consent to be bound by a treaty" (see Arts. 2, 11, 14 and 16 of the Vienna Convention). The authorities which are set out in the Memorial of Nicaragua (**I**), paragraph 87, provide strong confirmation that the conclusion of treaties is a matter of formal validity.

It is thus clear that the process of ratification is a matter entirely of the mechanics of expressing consent and the expression of consent can be perfected by other means. It follows that the conduct of the party concerned is itself a means of expressing consent, or of affirming consent, to be bound and thus eradicates the original defect in the form of the expression of consent.

The propriety of this analysis is amply confirmed by the Judgment of the Court in the *Temple of Preah Vihear* case, *Preliminary Objections*. The material passage is of relevance not least because the context consists of the provisions of Article 36 of the Statute and the reasoning lies at the heart of the Court's decision on the issue of jurisdiction. The key passage is as follows. The Court says:

> "To sum up, when a country has evinced as clearly as Thailand did in 1950, and indeed by its consistent attitude over many years, an intention to submit itself to the compulsory jurisdiction of what constituted at the time the principal international tribunal, the Court could not accept the plea that this intention had been defeated and nullified by some defect not involving any flaw in the consent given, unless it could be shown that this defect was so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement. The Court does not consider that this was the case and it is the duty of the Court not to allow the clear purpose of a party to be defeated by reason of possible defects which, in the general context, in no way affected the substance of the matter, and did not cause the instrument to run counter to any mandatory requirement of law.
>
> The Court therefore considers that the reference in the Declaration of 1950 to paragraph 4 of Article 36 of the Statute gave the Declaration, for reasons already given, the character of an acceptance under paragraph 2 of that Article. Such an acceptance could only have been an acceptance in relation to the present Court. The remainder of the Declaration must be construed in the light of that cardinal fact, and in the general context of the Declaration . . ." (*I.C.J. Reports 1961*, p. 34.)

Mr. President, it is difficult to think of any reason why this analysis should not apply, *mutatis mutandis*, to the acceptance of jurisdiction by virtue of the provisions of Article 36, paragraph 5, of the Statute. This passage from the Judgment in the *Temple of Preah Vihear* case, and those that preceded it (*ibid.*, pp. 30-34), are concerned with an important question of general principle that the parties "are free to choose what form they please provided their intention clearly results from it" (*I.C.J. Reports 1961*, p. 31), and the Court was referring to declarations accepting the compulsory jurisdiction as examples of a wide category of legal transactions (*ibid.*).

The Court was clearly interested in an effective and practical concept of consent and this appears from the following passage from the Judgment:

> "The Court cannot, however, see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give in 1950. There was in any case a real consent in 1950, whether or not it was embodied in a legally effective instrument and it could not have been consent to the compulsory jurisdiction of the Permanent Court, which Thailand well knew no longer existed." (*Ibid.*, p. 30.)

At this point, I can present my first conclusion to the Court.

As a matter of legal principle, the consent of a State to the compulsory jurisdiction of the Court may be evidenced by conduct and a formal defect in the expression of consent will not be allowed to defeat the intention of the declarant State. It is the reality of the consent which counts. International law prescribes no particular form, and the parties are "free to choose what form they please provided their intention clearly results from it" as it was put in the *Temple of Preah Vihear* case (*ibid.*, p. 31).

The Evidence of Nicaragua's Consent to the Compulsory Jurisdiction of the Court

Mr. President, I can now turn to the particular elements in the evidence of Nicaragua's consent to the compulsory jurisdiction. In brief, the evidence consists of a series of important public documents generally available to Governments, including the *Yearbook* of the Court since its first issue in 1946, the general opinion of States, and the general opinion of qualified publicists of the various nations.

At the least, these elements have their own evidential significance and they confirm the interpretation of Article 36, paragraph 5, of the Statute, expounded by my learned colleague Professor Chayes. However, these elements may be seen in a different perspective. The sheer quantity, variety, and persistence over the years, of these expressions of opinion have put Governments on notice of the prevailing view, including the view held by the Registry of the Court.

There was thus a settled general opinion according to which Nicaragua's declaration of 1929 was in force in accordance with the provisions of Article 36, paragraph 5, of the Statute. Neither Nicaragua nor any other declarant has expressed any objections to the inclusion of the declaration in the *Yearbook*, and the absence of any reservation on the part of the original declarant or on the part of other declarants or on the part of other parties to the Statute, has the legal consequences:

either that the consent first expressed in 1929 was confirmed;
or that the consent of Nicaragua to the compulsory jurisdiction may be implied;
in either case as a result of the conduct of Nicaragua over a period of 38 years.

And, of course, there may be little or no practical difference between the two interpretations of the facts.

What is clear, Mr. President, is that the consent of Nicaragua, as implied from her conduct in fact of the general opinion concerning the status of her declaration as a valid acceptance of the compulsory jurisdiction of the present Court, provides a title of jurisdiction independently of the title of jurisdiction based upon the operation of Article 36, paragraph 5, and examined with characteristic lucidity by my colleague Professor Chayes.

Before addressing the evidence directly, there are two other considerations which provide a necessary preface to the materials themselves.

The first consideration relates to the provision of Article 36, paragraph 5, which came into force as a part of the Statute in 1945. These provisions provide a background to the specific evidence of Nicaragua's consent, since it is reasonable to assume that the Government of Nicaragua, like the officials of other governments and the officials of the Registry of the Court, considered that the declaration of 1929 was in force consequent upon the operation of Article 36, paragraph 5. Thus there was, so to speak, a tradition created, a background of presumed validity in respect of Nicaragua's declaration, which fits quite naturally with and explains the attitude of consent adopted by Nicaragua for a period of nearly four decades.

The second consideration which prefaces the evidence is closely related to the first. There was no special procedure for the application of the provisions of Article 36, paragraph 5, and thus there could be no form of consent available to a State whose declaration appeared in the *Yearbook* of the new Court other than approbation and acceptance by conduct.

Indeed, inclusion in authoritative sources, and, in particular, the *Yearbook* of the Court, was the nearest thing to a process of certification that Article 36, paragraph 5, was applicable to a particular declaration.

The Series of Important Public Documents

Mr. President, I shall now begin my review of the extensive series of public documents which instructed the world at large that the declaration of Nicaragua constituted an acceptance of the compulsory jurisdiction of the new Court as a consequence of the operation of Article 36, paragraph 5.

In truth the three evidential sources, the public documents, the general opinion of States, and the expert opinion of qualified publicists, interact and in strict logic there is no reason to give priority to any one of the three sources. However, for practical purposes the public documents should be looked at first, since there can be little doubt that it is the documents which were the first to set the tone.

It is not my intention to reproduce the precise references which appear in the Memorial addressed to the Court on behalf of Nicaragua, and cross-references will be provided in the verbatim record for the convenience of the Court.

The Yearbook *of the Court 1946 to 1983*

It is natural to look first at the *Yearbook* of the Court from 1946 to the present day. As Professor Chayes has already indicated to the Court, the first *Yearbook* of the new Court, that of 1946-1947, records in three separate places that the declaration of Nicaragua was "deemed to be still in force" by virtue of Article 36, paragraph 5, of the Statute. Moreover, this significant assessment of the status of the declaration was accompanied by a footnote which recorded the fact that the deposit of the instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court had not been notified to the Registry.

Thus from the very beginning the possibility of the existence of a formal defect in the context of the old Statute was recorded, but clearly not considered either to affect the essential validity of the declaration of 1929 or to preclude the operation of Article 36, paragraph 5.

The declaration of Nicaragua has been included in all the *Yearbooks* of the Court since 1946, a period of 38 years. The footnote which appeared in the *Yearbook* of 1946-1947 (at p. 210) is not repeated in the subsequent issues until the *Yearbook 1956-1957*. There the following footnote appears at page 218:

> "According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations."

The final sentence of this footnote is a variation of the footnote appearing in 1946 but the change appears to be a mere question of wording.

The *Yearbooks* since the issue for 1956-1957 have contained the declaration with this version of the footnote. It is to be noted that the footnote involves nothing more than a record of factual data and no legal conclusion is adduced. The issue of ratification is not characterized in any manner or form. Moreover, whilst it may seem rather obvious, the footnote is not there by itself, but it is appended to the declaration of Nicaragua which is always included, either by reference back to the *Yearbook 1946-1947* or textually.

From the *Yearbook* for 1956-1957 until the present the relevant section of the *Yearbook* has been introduced with a form of words referring to the operation of Article 36, paragraph 5. This form of words has varied over the years, but not significantly.

Thus the introduction to the second part of the *Yearbook* for 1956-1957 contains the following:

> "By virtue of paragraph 5 of Article 36, declarations made under Article 36 of the Statute of the Permanent Court of International Justice which are still in force shall be deemed, as between the Parties to the Statute of the International Court of Justice, to be acceptances of the compulsory jurisdiction of the latter Court for the period which they still have to run and in accordance with their terms. Accordingly, the texts of declarations made under the Statute of the Permanent Court which have not expired are also given below." (P. 207.)

Since the *Yearbook* for 1972-1973 the same form of words has been used. The same passage has been in a rather slightly different form:

> "In view of the provisions of Article 36, paragraph 5, of the Statute of the International Court of Justice, the present section also contains the texts of declarations made under the Statute of the Permanent Court of International Justice which have not lapsed or been withdrawn. There are now eight such declarations."

These statements do, of course, involve assertions of the legal status of the declarations concerned. However, in the *Yearbook* for 1956-1957 the statement introducing the texts of declarations includes the following proviso:

> "The text of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question." (P. 207.)

This proviso (with slight variations) appeared in subsequent editions of the *Yearbook*, including the latest edition (*Yearbook 1982-1983*, p. 50). The effect of the proviso would, so to speak, be neutral, since it would apply both to the declaration of Nicaragua and to the footnote so far as that might be said to have any legal significance.

At any rate, the general issue can now be addressed: what is the evidential significance of inclusion of the declaration in the *Yearbook*, assuming *for the present* that there is no proviso?

Mr. President, the most authentic public record of the acceptances of the compulsory jurisdiction of the Court must surely be the *Yearbook*. This is a public document in every sense and is published by the Registry of the Court. The foreword by the Registrar indicates that the *Yearbook* is published on the instructions of the Court (*Yearbook 1982-1983*, p. v). The same foreword also states that "the *Yearbook* is prepared by the Registry and in no way involves the responsibility of the Court". The relevance of the *Yearbook* for present purposes is that of a public document emanating from the authority which is responsible for maintaining a record of information on matters such as acceptances of jurisdiction. The appearance of a declaration in the *Yearbook* puts the States concerned, and particularly other declarant States, on notice of a legal status quo as perceived by the Registry.

The inclusion of acceptances maintained by virtue of the provisions of Article 36, paragraph 5, would not be notified to States individually and the appearance of the first *Yearbook* of the new Court, that for 1946-1947, would constitute the first authoritative notification of the status of Nicaragua's declaration of 1929 vis-à-vis the Statute of the new Court. The source of the information would also be authentic, given the duties of the Registrar described in Article 26 of the Rules of Court. In particular, paragraph 1 of Article 26 stipulates that:

> "The Registrar, in the discharge of his functions, shall:
>
> (*m*) ensure that information concerning the Court and its activities is made accessible to governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law, and public information media."

Mr. President it simply does not make sense to deny evidential value to the data and documentation in the *Yearbook*. In evidential terms the *Yearbook* has the following characteristics which conduce to the credit and reliability of the information contained therein:

First, it is a form of expert opinion evidence.

Second, it is a public document which is generally available and open to scrutiny: and thus it may be expected that over the years the information it contains would be subject to review and monitoring by interested States, who could make representations to the Registrar in respect of apparent errors or omissions.

Third, it may be expected to be relied upon by States and in that sense it is held out as a careful and official record of information concerning the Court by the Registrar, whose duty it is to make such information available.

Mr. President, the fact that the Court is not in any legal sense bound by the contents of the *Yearbook* is not to be confused with the probative value of the contents.

The *Yearbook* is surely the normal and reliable source for information as to the application of Article 36, paragraph 5, to particular declarations. It is the considered opinion of the Registry, and though not conclusive, that opinion must carry considerable weight, more especially if it remains consistent over a long period of years.

Mr. President, in accordance with the general principles of the law of evidence the persistent pattern of date concerning the declaration of Nicaragua appearing in the *Yearbook* over a period of 38 years creates a presumption that the accuracy and reliability of the information that that declaration remained operative.

The existence of the proviso in certain issues of the *Yearbook*, I would respectfully submit, does not subtantially change the evidential picture. The proviso has the result that the Registry may revise or even contradict the information in the *Yearbook*. However, the information is on its face accurate and fit to be relied upon by governments and their advisers. The evidential significance of a pattern of information which remains substantially the same over a period of 38 years must be considerable.

The significance of the proviso can be illustrated by reference to the practice of government agencies in placing provisos on maps and charts published by them. It is understood by lawyers generally that such provisos do not reduce the evidential value, as expert opinion evidence, of the maps and charts, in the context of disputes between third parties.

Mr. President, the United States Counter-Memorial (**II**, paras. 131-132) relies upon the proviso, although only as a basis for the mild statement at paragraph 132 that "the Yearbook has never asserted that its listing is authoritative or final". But of course, the United States pleading also relies heavily upon the footnote to the Nicaraguan declaration and, even if that footnote has the significance attributed to it by our distinguished opponents, the proviso must damage both the declaration and the footnote. In this respect, the United States argument is remarkably inconsistent.

Reports of the International Court of Justice to the United Nations General Assembly

Mr. President, I shall now move from the *Yearbook* of the Court to the other public documents which evidence the status of the Nicaraguan declaration as a valid acceptance of the Court's compulsory jurisdiction, and first of all to the Reports which the Court has made annually to the General Assembly, beginning with the Report for 1967-1968.

Each Report in a series covering a period of 16 years includes Nicaragua in the list of "States recognizing the jurisdiction of the Court as compulsory". No reference is made to the issue of ratification of the Protocol of Signature of the Statute of the Permanent Court (**I**, Nicaraguan Memorial, para. 59).

The Reports are signed by the President of the Court and published as a part of the official records of the sessions of the General Assembly. They do not carry any proviso, and the contents must be regarded as authentic. The Reports emanate directly from the Court itself, are public in every sense, being widely available to member States and others, and are rendered by virtue of the accountability which the Court has, subject to the requirements of judicial independence, by virtue of its status as "the principal judicial organ of the United Nations". The probative value of these Reports is considerable, Mr. President, and they were given appropriate exposure in the Memorial submitted by Nicaragua on 30 June. It is perhaps significant that the United States Counter-Memorial maintains a discreet silence in face of such important evidence.

Documents emanating from the Secretary-General of the United Nations

Mr. President, my review of the relevant public documents now advances to those documents emanating from the Secretary-General of the United Nations.

In his second Annual Report to the General Assembly (General Assembly, *Official Records*, 1947, Supp. No. 1, A/315), the Secretary-General included Nicaragua within a list introduced by the following words:

> "The following States, having under Article 36 of the Statute of the Permanent Court of International Justice made declarations which have not yet expired accepting the compulsory jurisdiction of that Court, are deemed, in accordance with Article 36 of the Statute of the International Court of Justice, to have accepted the compulsory jurisdiction of the International Court of Justice under the same conditions."

No reference was made to the question of the ratification of the Protocol of Signature.

Since 1949, the Secretary-General of the United Nations has published annually a volume entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary*. The first issue, for 1949, contains a table of States under the heading "States Whose Declarations Were Made Under Article 36 of the Statute of the Permanent Court of International Justice and Deemed to Be Still in Force" (pp. 18-22). Nicaragua is included in the list. There is no footnote to the listing. The information is stated to be derived from the *Yearbook* of the Court for 1947-1948.

This treatment of the declaration of Nicaragua continued until the issue for 1959. Thereafter, a footnote (as in the *Yearbook* of the Court) became a regular appearance: see the volume for the period ending 31 December 1982 (ST/LEG/SER.F/2, New York, 1983, pp. 24-25). Thus the Nicaraguan declaration was scheduled as "deemed to be still in force" from 1949 until the present day. (For details: **I**, Nicaraguan Memorial, para. 62.)

As the Statute of the Court requires, the Secretary-General has the function of depositary in respect of declarations made under Article 36 of the Statute and in any case the treaty and analogous information published under the auspices of the Secretary-General has an obvious authenticity of its own.

Other United Nations and Court publications

Mr. President, the extended family of public documents has other members of which two stand out. The first is the *Yearbook of the United Nations*. The *Yearbook of the United Nations* for 1946-1947 (p. 611) under the heading of "States accepting Compulsory Jurisdiction", includes Nicaragua, and states that the

> "declaration took effect on November 29, 1939 when the Nicaraguan Government notified the Secretary-General of the League of Nations of Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court".

This statement does not appear in subsequent issues. In the *Yearbook* for 1948-1949 (p. 151), Nicaragua is included in the list of States accepting compulsory jurisdiction with a footnote referring to the application of Article 36, paragraph 5. The same treatment appears in the following *Yearbook* for 1950 (pp. 123-124). The *Yearbooks* from 1951 to 1980 (inclusive) include Nicaragua in the list of acceptances without any footnote. (**I**, Nicaraguan Memorial, para. 63.)

No doubt this publication was compiled from other sources, but it is a standard work of reference and its contents establish the notoriety of the fact that Nicaragua had accepted compulsory jurisdiction of the Court. This fact has been presented in the *Yearbook* in its annual editions for a period of 38 years.

It is perfectly normal for official works of reference to include Nicaragua in the listing of acceptances of the compulsory jurisdiction. Some further examples are included in the Nicaraguan Memorial (**I**, paras. 60 and 64), and it will suffice to refer to one other standard work published by the United Nations in 1948 under the title "Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948". This includes the Nicaraguan declaration, without a footnote, in an annex of "Declarations continued in force under Article 36 paragraph 5, of the Statute of the International Court of Justice" (pp. 1150, 1156).

The entire group of public documents shows an impressive consistency and constitutes both substantial and authentic evidence of the general opinion prevailing during the life of the new Court from the appearance of the *Yearbook* for 1946-1947 until the present.

The General Opinion of States

Mr. President, that concludes my presentation of the family of public documents containing reference to the declaration of Nicaragua, and I can now move to the second major form of evidence confirming the essential validity of the declaration under the Statute of the present Court.

In assessing the continuance in force of a treaty or equivalent consensual obligation, the *general opinion of States* on the status of the instrument concerned, has probative value. This was affirmed in the joint dissenting opinion of five Judges in the *Nuclear Tests* case (*I.C.J. Reports 1974*, pp. 340-344, paras. 60-70). In that opinion it is stated:

> "Accordingly, France was doing no more than conform to the *general opinion* when in 1956 and 1957 she made the 1928 Act one of the bases of her claim against Norway before this Court in the *Certain Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9)." (*I.C.J. Reports 1974*, p. 341, para. 62; emphasis added.)

This great family of public documents gave the widest possible currency to the validity of the declaration of Nicaragua, and until these proceedings, no State has challenged that validity. In fact a number of States have given express recognition of the validity of the declaration of 1929.

My learned friend Professor Chayes has already demonstrated that in the proceedings in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* both Nicaragua and Honduras recognized the existence of a valid Nicaraguan declaration.

The United States has also given express recognition in the pages of the official publication, *Treaties in Force*, over a period of many years, and Professor Chayes has given the Court a detailed account of the provenance and precise legal significance of that standard work of reference.

But the evidence extends further, Mr. President, and it is clear from the sample of treaty lists available that it is quite normal for the Nicaraguan declaration to be included. For the convenience of the Court copies of the pertinent parts of these public documents have been furnished by the Agent of Nicaragua.

The *Liste des traites et accords de la France* in force on 1 January 1982 contains a list of States parties to the Charter of the United Nations and the Statute of the Court with a footnote indicating the "Etats reconnaissant comme obligatoire la juridiction de la Cour internationale de justice". Nicaragua is included in exactly the same form as the other declarants in the list. The list is a publication of the French Foreign Ministry.

Nicaragua also appears, without any qualification, as a declarant State in the collection of treaties and treaty information published by the Foreign Ministry of the German Federal Republic (Vol. III, p. A600-44) published in 1979; in the Swedish treaty list published in 1948; and in the Dutch treaty list published in 1956.

Thus five representative treaty lists include Nicaragua's declaration with no expression of doubt. Moreover, the German publication expressly and without qualification records the fact (*ibid.*, p. A600-41, at p. A600-44) that the Nicaraguan Declaration is still valid as an acceptance of jurisdiction by virtue of Article 36, paragraph 5, of the Statute.

Not all States, of course, make treaty lists available in official publications and the treaty information sources of the five States I have chronicled surely constitute a reasonable sample of the views of States generally.

The General Opinion of Publicists

From the general opinion of States I turn now to the general opinion of publicists, and this completes the trilogy of the forms of evidence confirming the validity of the declaration of Nicaragua. The views of individual publicists have been examined by my colleague Professor Chayes and it is therefore only necessary for me to make a brief reference to the publicists in order to complete my record of the complementary forms of evidence. In any case the general opinion of publicists, that is, of authoritative writers, blends with the other sources in practice, and there is thus a synthesis to be made of the sources.

Synthesis of the evidence

Such a synthesis of public documents and official works of reference, the general opinion of States and the general opinion of publicists, is one which directly reflects the experience of governments and of their legal advisers.

It is a synthesis which can be demonstrated very simply by looking at the hypothetical foreign ministry legal adviser who wishes to know what the jurisdictional picture is and who has access to a good working collection of books. Apart from a treaty list, if one were available, what would he take down from the shelf? The obvious possibilities are the following:

1. The latest edition of the Secretary-General's compendium of Multilateral Treaties.
The Declaration of Nicaragua is listed without a footnote.
2. The latest edition of the United States official publication, *Treaties in Force*.
The Declaration is listed again, with no reservation or footnote.
3. The most recent edition of the *Yearbook* of the Court.
The Declaration is included with the footnote.
4. The most recent *Yearbook of the United Nations*.
The Declaration is listed without a footnote.

Thus far, Mr. President, the legal adviser has taken down official publications. But supposing he were to refer to non-official standard sources. What would he find? The most obvious source in English would be *Oppenheim's International Law*, edited by Sir Hersch Lauterpacht. In the seventh edition of Volume II, the declaration of Nicaragua is referred to as one of "a growing number of acceptances which are not accompanied by reservations" (p. 64, note 3). Again, if he turned to Professor O'Connell's *International Law*, second edition, Volume II, he would find Nicaragua listed as a declarant State (p. 1080, note 56), with no qualification. Reference to the monograph by the Indian expert, Professor Anand, on the *Compulsory Jurisdiction of the International Court of Justice* (London, 1961, p. 54, note 61) would produce the same result.

If the legal adviser were francophone he would no doubt turn to the treaties by Professor Rousseau. In Volume V of his treaties, published in 1983, he would find Nicaragua listed as having a valid declaration, and no qualification is expressed by the author (*Droit international public*, V, p. 455).

Thus in seven very standard sources, whether official or non-official, whether of the United Nations or United States provenance, whether anglophone or francophone, the legal adviser receives the same impression. The essential validity of the declaration of Nicaragua is undoubtedly generally recognized, and it is what common lawyers call a matter of general repute.

Conclusion: Nicaragua's Consent to Be Bound as Evidenced by Conduct

Mr. President, my review of the three forms of evidence — the public documents, the general opinion of States, and the general opinion of publicists — is now complete, and at this point I can begin to draw this part of my argument to a conclusion.

The issue to be addressed is the legal significance of the conduct of Nicaragua in respect of the declaration of 1929 as an acceptance of the compulsory jurisdiction of the new Court.

The precise issue is whether Nicaragua has validly consented to the compulsory jurisdiction for the purposes of Article 36. Such consent may be implied from the conduct of Nicaragua herself and, in particular, her failure to make any reservation in face of the persistent inclusion of Nicaragua as a declarant State in the public documents.

A central feature of the case is the general reputation to the effect that the declaration of 1929 was a valid acceptance of the compulsory jurisdiction. In face of this concurrence of sources, the general opinion of States, and authoritative publicists, Nicaragua did not make any complaint or reservation. Instead, both in the *King of Spain* case and in these proceedings, she appeared as a party to proceedings initiated on the basis of the declaration contained in the *Yearbook* of the Court.

As I have already stressed, a consent which is implied has as much reality and validity as any other consent, provided there is evidence of intention.

The evidence of intention is clear. Since the declaration of 1929 was always included in the pertinent sources, and since no additional procedure was called for in respect of the provisions of Article 36, paragraph 5, the only other evidence of Nicaragua's acceptance of jurisdiction would necessarily take one of three forms:

First: Nicaragua's silence in face of the inclusion of her declaration in public documents over a period of 38 years.

Second: Nicaragua's appearance, unprotesting, as a Respondent: and this happened in the *King of Spain* case.

Third: Nicaragua's making an Application to the Court as it has in these proceedings.

Mr. President, the evidence of intention to accept the compulsory jurisdiction is there. In the words of the Court in the *Temple of Preah Vihear* case, Nicaragua has "evinced as clearly as Thailand did in 1950, and indeed by its consistent attitude over many years, an intention to submit itself to the compulsory jurisdiction" (*I.C.J. Reports 1961*, p. 34), and in my respectful submission the Court should now allow that intention to be defeated by a possible defect which does not affect the substance of the matter.

The conclusion that Nicaragua has consented to the compulsory jurisdiction would accord with and reflect the general opinion of States and experts and would thus represent the reasonable expectations of Governments and their advisers. The recognition of Nicaragua's declaration as a valid acceptance of jurisdiction has been a part of the usual course of dealing in the international community. Indeed, the United States attempt to modify its declaration (in the note of 6 April) would have no *raison d'être* but for the existence of a valid Nicaraguan declaration.

On the basis of the evidence of Nicaragua's consent, as shown by her conduct, I can now indicate the legal implications, both in respect of Nicaragua's consent as such, and in respect of the conduct of the parties to the Statute of the Court generally.

The legal implications are twofold.

In the first place the conduct of the parties to the Statute of the Court, including Nicaragua and the United States, confirms the essential validity of the declaration of Nicaragua for the purposes of Article 36, paragraph 5, of the Statute. The subsequent conduct of the parties to the system of consensual obligations constituted by the Optional Clause and the interacting declarations provides a reliable basis for the resolution not only of questions of interpretation as such but also questions concerning the continuance in force of legal instruments; and this role is referred to by writers of authority, including Lord McNair and Charles De Visscher (references: I, Nicaraguan Memorial, para. 96).

It may be recalled that in the *Nuclear Tests* case the joint dissenting opinion of four Judges relied upon the practice of the parties as evidence on the particular issue of the continuance in force of the General Act of 1928 (*I.C.J. Reports 1974*, pp. 340-345, paras. 60-70).

And in the present case the practice of the Parties has confirmed the essential validity of the declaration of Nicaragua for the purposes of Article 36 of the Statute.

So much for the first legal implication.

The second legal implication of the evidence of Nicaragua's consent as evidenced by her conduct is more decisive. That consent, based upon conduct over a period of 38 years since 1945, provides an independent title of jurisdiction separate from the jurisdictional title based upon Article 36, paragraph 5, of the Statute.

Nicaragua has by her conduct, her consistent attitude over a period of 38 years, accepted the jurisdiction of the Court by recognizing the declaration included in the *Yearbook* of the Court as a valid instrument.

With your permission, Mr. President, I may refer once again to the Judgment in the merits phase of the *Temple of Preah Vihear* case (*I.C.J. Reports 1962*, p. 6). The principle of recognition or agreement by conduct was stated and effectively applied by the Court in that case. The key passages relate to the famous Annex I map which, it may be remembered, lacked any formal status when it was produced by the French element of the Mixed Commission, but which was shown to and given currency by the Thai authorities on various occasions from 1908 until 1958, when a reservation was first made. The Court stated the principle in the following passages:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*" (*I.C.J. Reports 1962*, p. 23.)

And in another passage:

> "The Court however considers that Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to negative this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line." (*Ibid.*, pp. 32-33.)

The example of that case is, I submit, of considerable interest for present purposes. In the first place the Court was concerned with the highly important question of title to territory.

Secondly, the conduct involved not merely a waiver of a formal defect, but much more, since the Annex I map lacked legal status altogether apart from the process of Thai acknowledgment and recognition. Indeed, the contents of the map were affected by error, since the line on the map did not coincide with the escarpment as required by treaty. Thus the process of acceptance, recognition or adoption was applied to problems extending well beyond that of formal validity. The Court evaluated the conduct of Thailand in terms of the language of agreement and acceptance (*I.C.J. Reports 1962*, pp. 22-33). In particular, the Court stated: "Both parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line." (*Ibid.*, p. 33.) And then again: "The Court considers that the acceptance of the Annex I map by the parties caused the map to enter the treaty settlement and to become an integral part of it." (*Ibid.*)

As Professor Cahier has shown in an excellent study published in 1968, the conduct of States has been prominent in many cases involving weighty issues such as title to territory or the modification of treaties. I refer to the essay published by Professor Cahier in the volume of essays in honour of Paul Guggenheim published in 1968 ("Le comportement des États comme source de droits et d'obligations", in *En Hommage à Paul Guggenheim*, Geneva, 1968, pp. 237-265). There seems to be no good reason why the relevant principles should not apply to the acceptance of the Court's compulsory jurisdiction.

In sum, Mr. President, Nicaragua has consented to the compulsory jurisdiction of the Court by the recognition and acceptance of the declaration published in the *Yearbook* of the Court (either textually or by reference) for a period of 38 years.

Provided the consent of Nicaragua has been established, the attitude of the United States towards Nicaragua's declaration is not necessarily decisive, since of course it is the Court which determines the jurisdictional issue. However, the United States attitude on this occasion is of legal significance because, in face of the general opinion of States and the series of public documents acknowledging the validity of Nicaragua's declaration, the United States has remained silent.

Moreover, the United States has expressly recognized the validity of the declaration for a period of 28 years by listing Nicaragua in the appropriate place in the official publication, *Treaties in Force*, from 1955 until the most recent edition in 1983. Of course, inclusion of an instrument creating legal obligations in an official treaty list constitutes evidence of the views of that State as the continuance in force of the instrument concerned: I refer to the *Nuclear Tests* case (*I.C.J. Reports 1974*, p. 340, para. 61 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock)). And it may be recalled that in the *Arbitral Award* case the Court regarded publication in the *Official Gazette* of Nicaragua as evidence of acceptance by Nicaragua of the Award (*I.C.J. Reports 1960*, p. 213).

This consistent pattern of United States conduct over a very long period constitutes unequivocal recognition of the essential validity of the declaration of Nicaragua and, as a consequence, the United States is precluded from raising any question as to the application of Article 36, paragraph 5, and the validity of the declaration.

The principle of recognition is familiar, of course. It was applied, for example, in the *King of Spain* case itself (*I.C.J. Reports 1960*, p. 192), where the Court stated that:

> "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award." (*Ibid.*, p. 213.)

As a further legal consequence of the conduct of the Parties in the present case, both Nicaragua and the United States have recognized that any defect in the process of ratification of the Protocol of Signature of the pre-1945 Statute does not affect the essential validity of Nicaragua's consent to the compulsory jurisdiction of the Court by virtue of the provisions of Article 36, paragraph 5, of the Statute of the present Court.

Mr. President, this concludes the phase of the arguments of Professor Chayes and myself on the legal bases of the consent of Nicaragua to the jurisdiction of the Court.

It is our submission that the relevant legal principles, and the materials which evidence the conduct of the Parties, demonstrate beyond any reasonable doubt the full validity of the declaration of Nicaragua both by virtue of the provisions of Article 36, paragraph 5, of the Statute and by virtue of the consent of Nicaragua evidenced by her conduct, by the conduct of the United States, by the general opinion of States, and by the general opinion of qualified publicists.

And at this point, Mr. President, the argument must shift to the other necessary element of jurisdiction, the declaration of the United States.

The Note of 6 April 1984 Cannot Modify or Terminate the United States Declaration of 1946

The United States contends that the Court lacks jurisdiction as a consequence of the note to the Secretary-General dated 6 April 1984 and signed by the Secretary of State.

It may be helpful if I read the text of the Note:

> "I have the honor on behalf of the Government of the United States of America to refer to the Declaration of my Government of August 26, 1946,

> concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and to state that the aforesaid Declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

The note was supplemented a few days later by a Departmental Statement of 8 April 1984, which has an Appendix entitled "Examples of Modification of Acceptance of Compulsory Jurisdiction to Avoid Adjudication". The text of the statement can be found in the annexes of the Memorial of Nicaragua (**I**, Ann. II, Exhibit C). In the oral hearings relating to interim measures I had occasion to point out the inaccuracies which characterize the Appendix to the Departmental Statement (**I**, pp. 73-74) and there is no need for repetition here.

The United States argues that the note of 6 April constitutes a modification of the United States declaration accepting the compulsory jurisdiction.

In response the applicant State puts forward the following propositions:

First: The note of 6 April is ineffective because international law provides no basis for unilateral modification of declarations under Article 36 of the Statute.

Second: In the alternative, the note may be construed as a purported termination of the United States declaration of 1946, and in effect the substitution of a new declaration, and such an attempt at termination is likewise ineffective.

The Note of 6 April 1984 Regarded as a Purported Termination of the United States Declaration and the Substitution of a New Declaration

Mr. President, it will be convenient for the development of my argument if I deal first of all with the view that the United States note of 6 April constitutes a purported termination of the United States declaration of 1946, and in effect the substitution of a new declaration.

This position must be more or less hypothetical, since the preferred view of Nicaragua is that the note constitutes an attempt at modification rather than termination. Moreover, even if, which is not admitted, the note did have the effect of terminating the original declaration in accordance with its terms, such termination could only take effect six months after notice, and the declaration of 1946 therefore remained in force at the date of the Application.

In any event, the United States note has certain aspects which are suggestive of a termination and these are instructive, since they help to point up the oddities of the initiative taken on 6 April. Two of these factors indicative of termination may be mentioned. The first factor is the termination of jurisdiction *ratione personae* which effectively abolishes, *ex nunc* and whether for a period of two years or not, the entire ambit of jurisdiction as against certain States. That, Mr. President, is difficult to see as a matter of modification, and to characterize the exercise as a "suspension" of jurisdiction does not, perhaps, change the substance of the matter.

In the second place, certain evidence suggests that the real intention was to withdraw the declaration of 1946 and to substitute a new acceptance of jurisdiction consisting of the original instrument together with the contents of the note of 6 April. Thus all the precedents invoked in the Departmental Statement involved withdrawal of the declaration followed by the making of a new declaration (**I**, Memorial, Ann. II, Exhibit C).

In any case, Mr. President, whether the note be classified as a purported modification or a purported termination, is a more or less academic question, because in either event the initiative could not be effective in depriving the Court of jurisdiction. The United States has not reserved a right of modification at all, and a unilateral modification simply has no legal validity. And, so far as termination goes, the termination was not in accordance with the express terms of the declaration of 1946.

The Note of 6 April 1984 Regarded as a Purported Modification of the United States Declaration

Mr. President, I now come to the substance of this part of the argument, which is the legal validity of the unilateral modification or termination of a declaration accepting compulsory jurisdiction. In addressing the question I shall make two assumptions.

The first is that modification or termination within the terms of a valid declaration is legally effective; and the second is that the reservation of a right to modify a declaration is compatible with the Statute of the Court.

The legal nature of declarations

The legal character of the obligations arising from the making of declarations within the provisions of Article 36, paragraph 2, of the Statute is beyond doubt. However, the precise characteristics of those obligations are the subject of a certain amount of academic debate and my distinguished opponents seek to extract some advantage from that debate.

The United States contention is as follows: the declarations are "unilateral instruments". They are not subject to the law of treaties. Moreover, and I quote from the Counter-Memorial:

> "Modern State practice under the Optional Clause, the opinions of this Court, and the opinions of leading publicists, all indicate that declarations become binding between any two declarant States only when the Court is seized by the filing of an Application." (**II**, United States Counter-Memorial, para. 339.)

That, Mr. President, is the United States position on modification, and before I turn to the views of the Applicant State on these matters, I find it necessary to make some general observations on the *modus operandi*, that is to say, the general approach to legal materials evinced by the United States written pleading (at **II**, paras. 337-401).

Leaving aside for the moment the precise argumentation, the approach is fluid and confused in the extreme. The United States denies that the law of treaties is applicable *tout court*, and yet, it would appear, accepts that legal obligations of some type are involved. But the basis of those obligations is left awfully obscure.

Reference is made to "modern State practice", but the practice adduced is either irrelevant or represents a small minority of declarants.

Reference is made to "the opinion of this Court", but the evidence does not measure up to this assertion and, indeed, this is admitted subsequently, when the Counter-Memorial remarks that: "the issue previously has not been expressly decided by the Court . . ." (**II**, para. 401).

And lastly reference is made to "the opinions of leading publicists", and yet the vast majority of publicists contradict the United States position either expressly or by implication.

In short, the United States Counter-Memorial leaves the declarations of States under the Optional Clause in a legal wasteland and adopts a position as to the legality of unilateral modification which is contrary to legal principle and which receives no substantial support either from State practice or the opinions of leading publicists.

So much for the United States position on the question. I now turn to the view of the Applicant State. It is Nicaragua's position that the interlocking declarations generate obligations which are not strictly speaking treaties but constitute legal obligations of a consensual character governed by international law and subject to principles of interpretation essentially but not in all respects similar to the principles of treaty interpretation.

The fact that the operation of the obligations generated by the declaration is contingent upon the making of an Application by another declarant is perfectly compatible with the consensual nature of the obligations. Obligations which are contingent upon the act of one party or even of some external event are familiar to the legal systems of the world.

The corollary of the consensual nature of the system of declarations, evidenced by State practice and by doctrine, is the principle that a declaration can only be modified or terminated *either* in accordance with its own terms, *or* if there is a ground of termination arising from the general principles of the law of treaties (which are applicable according to the practice of States and the prevailing doctrine).

If I may stop there for a moment, Mr. President, and look at the position in a clear light, free of the fog of verbiage and citation which clings to the subject of jurisdiction.

In view of the United States, a declaration is not only subject to modifications but does not even become *binding* between two declarant States until the filing of an Application. The logic behind this supposition is fatally flawed. The contingency — the fact that a declaration only becomes engaged vis-à-vis a particular State when the Court is seized of a case — has no necessary connection with the question of obligation or of revocability.

In the conception of the United States the declarations made under the Optional Clause are no more than revocable options until they are picked up, so to speak, by an Application.

Now it is, of course, quite possible for obligations to be revocable but nonetheless legal, but it is inherently unlikely, Mr. President, that significant obligations of a public character should be freely revocable. Indeed, the wording of the provisions of the Statute simply does not fit obligations of such a friable character. For the actual language of Article 36, paragraph 2, is to be recalled:

> "The States parties to the present Statute may at any time *declare* that they *recognize as compulsory ipso facto* and without special agreement, *in relation to any other State accepting the same obligation*, the jurisdiction of the Court in all legal disputes . . ." (Emphasis added.)

And Article 36, paragraph 5, refers to "acceptances of the compulsory jurisdiction". The flexibility or, in the phrase used by the United States Counter-Memorial (**II**, para. 401), "the necessary adaptability" of the Optional Clause system, is supplied by the freedom which States have to choose to make declarations or not to make them, to make them conditionally or unconditionally, and so forth.

Ironically the United States position seeks to limit the principle of choice, since it literally does not allow States to make choices which are not freely revocable, and it assumes that extreme revocability is the optimum for States.

Reality and common sense say otherwise. In the first place, some 27 States have expressly reserved either the right of modification and/or the right of termination and those and other reservations made by States would seem to be otiose if the United States argument in these proceedings be correct.

Secondly, the United States declaration of 1946 itself provides an example of an acceptance of jurisdiction which was carefully and deliberately designed to prevent a withdrawal of the obligation in the face of a threatened legal proceeding (*Congressional Records*, Senate, August 1946, p. 10707).

Mr. President, I am drawing near to the end of my examination of the legal nature of the obligations arising from declarations made under Article 36. There seems to be no great profit in rehearsing the materials set forth in the Nicaraguan Memorial (**I**, paras. 108-114).

The authoritative sources there quoted point very strongly indeed to the conclusion that legal obligations arise at the time the declaration is made and not later.

The Court made the point with the utmost clarity in the case concerning *Right of Passage over Indian Territory, Preliminary Objections*, where the Court insisted that:

> "the contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration" (*I.C.J. Reports 1957*, p. 146).

And again from the *Right of Passage* case Judgment:

> "A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new Declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned." (*Ibid.*)

Authoritative writers express the same opinion.

Sir Gerald Fitzmaurice described declarations as "unilateral in form" but "contractual in substance" and, again, as "basically contractual in nature" (*British Year Book of International Law*, Vol. 33 (1957), para. 203, pp. 230-232).

Similarly, Sir Hersch Lauterpacht, who was already a Judge of this Court, characterized the position in these words:

> "Undoubtedly, the declarations under Article 36 (2) of the Statute, made as they are at different times and by different States, are not in all respects exactly like a treaty. But they are essentially a treaty. By their very terms they connote a reciprocity of rights and obligations although — as the result of practice rather than of the language of Article 36 (2) — it is for every declaring State to determine, through reservations, in a manner consistent with the Statute of the Court, what shall be the content of those reciprocal rights and obligations. Admittedly, it may not be easy to determine when and by means of what analytical construction there takes place, in such circumstances, the 'meeting of minds' required for the creation of a treaty obligation. However, the situation is not essentially dissimilar from that represented by accession to a treaty." (*The Development of International Law by the International Court*, London, 1958, pp. 345-346.)

Lastly, one may quote Charles de Visscher, who stated the point in the clearest possible terms:

> "Le système de la clause facultative s'analyse en un complexe de conventions bilatérales issues de déclarations unilatérales qui se rencontrent, cette rencontre ayant pour effet de faire naître successivement un lien consensuel entre les Etats déclarants à compter du jour du dépôt de leurs déclarations respectives." (*Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, p. 199.)

As it is put in the Report of the Senate Committee on Foreign Relations:

> "The force and effect of the Declaration is that of a treaty, binding the United States to those States which have or may in the future deposit similar Declarations . . . While the Declaration can hardly be considered a treaty in the strict sense of that term, the nature of the obligations assumed by the contracting parties are such that no action less solemn or less formal than that required for treaties should be contemplated." (Nicaraguan Memorial, Ann. II, Exhibit D, I, p. 442; p. 320.)

These expressions of opinion make no reference to a general revocability of declarations but stress their contractual nature and, in particular, the fact that the obligation crystallizes at the time of the deposit of the declarations of acceptance. And it goes without saying that they are, all three of the opinions I quoted, opinions of very considerable authority.

Mr. President, I shall turn next to the closely related but more specific question of the validity of the United States note of 6 April as an attempt to modify the terms of the declaration of 1946.

This I shall address in two stages.

First: I shall advance the proposition that there is no unilateral right of modification of declarations made under the Optional Clause.

Second: I shall demonstrate that the purported unilateral modification of 6 April is in any case invalid by virtue of the express terms of the United States declaration of 1946.

The non-existence of a right of unilateral modification of declarations of acceptance: as a question of general principle

1. The principle stated

The major proposition on which this part of my argument is based is, quite simply, that there is no unilateral right to modify declarations unless this has been expressly reserved. This proposition can be justified as a matter of principle, and it receives substantial support both from State practice and from doctrine.

The points of principle have already been set before the Court in my address and they can be summarized by saying that the declarant State has the freedom of choice open to any person entering into an agreement. This freedom of choice operates at the time the declaration is made and the declarant locks on to the system of the Optional Clause. The declarant is free to reserve the right to modify, to fix time-limits, and so forth. But there is no automatic revocability. As a matter of general principle, such a revocability would be anomalous, and the language of Article 36 of the Statute, as I have already pointed out, militates strongly against the hypothesis of revocability.

As in the law of contract, so with the consensual obligations here in question, the freedom of choice is exercised at the time of making the contract, and that freedom includes the choice to make non-revocable obligations. The United States Counter-Memorial presents a highly artificial and limited concept of freedom of choice (**II**, para. 357), and confuses contractual freedom with a concept of mandatory revocability.

These considerations of principle and legal logic are, not very surprisingly, reflected in the appropriate legal sources, and these will now be examined.

2. *The evidence of State practice*

It is convenient to look first at the evidence of State practice. On behalf of the United States it is contended that the practice of States "demonstrates that declarations are, accordingly, inherently modifiable up to the date the Application is filed" (**II**, United States Counter-Memorial, para. 339). In the view of Nicaragua that conclusion is not justified by the evidence and a substantial preponderance of State practice supports the view that termination and modification of declarations can only take place in compliance with the principles of the law of treaties, which are generally recognized as being applicable by way of analogy.

Before I turn to the evidence as it is presented in the United States written pleading, it will be helpful if I point to the dominant feature of the evidence overall, which is the fact that 15 States have expressly reserved the right to modify their declarations with immediate effect, and 22 have expressly reserved the right to terminate on notice. These data are recorded in the United States Counter-Memorial (**II**, paras. 362-364). Thus, the total number of States to have made either one or both of these reservations is 27. Now the United States asserts that declarations are inherently modifiable, but how can this be so when 27 States out of a total of 47 existing declarants have expressly reserved either the right of termination, or the right of modification, or both of those rights?

That, Mr. President, is the background against which the evidence offered by the United States Counter-Memorial (**II**, paras. 362-374) must be examined.

In the first place, a number of palpably irrelevant and even self-contradictory points are made in the United States pleading. Thus the incidence of express reservation of rights of termination or modification is pointed out, although this evidence cannot establish an inherent right of modification (**II**, paras. 362-364).

Again, examples are given which show that States have exercised rights of termination or modification expressly reserved with the intention of avoiding prospective adjudication (**II**, paras. 365-366). But it is not explained why this material is relevant to the issue of the existence of an inherent right of modification. Indeed, it is observed that "none of the actions discussed *supra* provoked protests by other States" (**II**, para. 366). That is understandable of course, since there would be no legal basis for making such protests.

The five examples

Eventually, the United States Counter-Memorial (**II**, paras. 367-374) moves on to five instances of State practice in which States have purported to modify or terminate declarations in the absence of an express reservation of the right to do so.

These instances will be examined in chronological order.

A. Colombia (1936)

The first case offered in the Counter-Memorial is that of Colombia, which had made a declaration in 1932 which did not reserve a right of modification or termination (see *Collection of Texts*, 4th ed., Series D, No. 6, p. 54). In 1936 this declaration was modified by the introduction of a clause which allowed the acceptance to apply only to disputes arising out of facts subsequent to 6 January 1932 (see *Thirteenth Annual Report, P.C.I.J. 1936-1937*, pp. 276-277). The following year Colombia deposited a new declaration incorporating the modification of 1936 (see the *I.C.J. Yearbook 1982-1983*, p. 61).

However, when the contents of the Colombian letter dated 27 August 1936 to the Secretary-General of the League are studied, it becomes clear that the text of the declaration of 1932 had failed to convey the true intention of the declarant State and the exercise was accepted on all sides as the uncontroversial process of correcting a textual error (*Thirteenth Annual Report, P.C.I.J. 1936-1937*, pp. 276-277). And it is this which explains why none of the writers sees fit to refer to the action of Colombia as an instance of unilateral modification.

B. Paraguay (1938)

The second instance adduced by the United States is the purported withdrawal by Paraguay in 1938 of a declaration which had been made without limit of time. The explanations offered for this action were twofold: the fact that Paraguay had ceased to be a Member of the League of Nations and, secondly, the fact that its acceptance was not made for any stated period (League of Nations, *Official Journal*, 19th Ass., pp. 650-652 (1938)).

Following the notification of the Secretary-General of the League of the purported withdrawal — which took the form of a decree — Bolivia notified the Secretary-General of her "most formal reservations as to the legal value of the decree" (*Fifteenth Annual Report, P.C.I.J. 1938-1939*, p. 227).

At the same time Bolivia requested that her reservations should be communicated to other signatories of the Statute. In response five other States made reservations in general terms as to the legal effects of Paraguay's purported withdrawal of her declaration (*ibid.*). Of these five States, two — the Netherlands and Czechoslovakia — expressly stated that they regarded the question as being governed by the law relating to the termination of treaties (see also League of Nations, *Official Journal*, 1938, pp. 686-687, 1180-1182; *ibid.*, 1939, p. 235).

Mr. President, it is difficult to see what profit this episode gives the United States in the present case. The opinion of publicists writing at the time was that the Paraguayan move lacked legal justification.

Thus, for example, Alexander Fachiri, a well-known commentator on the Permanent Court, wrote that none of the reasons put forward by Paraguay for her action "has any validity in law" (*British Year Book of International Law*, Vol. 20 (1939), p. 52, at p. 57).

Moreover, the general opinion of publicists has been to the effect that the validity of the purported withdrawal depended upon the general principles of the law of treaties.

Thus Fachiri, already quoted, writing in 1939.

So also *Oppenheim's International Law* (Vol. II, 7th ed., by Sir Hersch Lauterpacht, 1952, p. 61, note 2).

A similar view was expressed by Sir Humphrey Waldock, in the *British Year Book of International Law* (Vol. 32 (1955-1956), p. 244 at p. 264) where he is commenting on the Paraguayan notice of withdrawal. In his words:

> "The reservations of Bolivia and the other five States in 1938 and the cautious attitude of the Registry in regard to the Paraguayan notice of cancellation are believed to have been well founded. A State which, having

> the right to make its declaration only 'for a certain time', chooses to make it without time-limit, is in a position analogous to that of a State which has entered into a bilateral treaty of indefinite duration. If two States both have declarations without time-limit, their position *vis-à-vis* each other seems clearly to be that of parties to a bilateral treaty of indefinite duration, and any right which either State may have to put an end to their mutual obligation to accept the compulsory jurisdiction of the Court under the Optional Clause can only derive from the general law concerning the termination of treaties. The agreement between the two States, which is constituted by their parallel acceptances of the Optional Clause, contains no reference to a right arbitrarily to terminate their mutual obligation under the Clause simply by giving notice to the Secretary-General. Nor can such a right be implied in Article 36 of the Statute, paragraph 3 of which clearly contemplates an indefinite commitment unless provision for a time-limit is made when a State makes its declaration."

See also Engel, *Georgetown Law Journal*, Volume 40 (1951) (p. 41 at pp. 53-59).

It may be noted, in conclusion, that the Registry of the new Court maintained the original Paraguayan declaration of 1933 in the list of operative declarations under the Optional Clause with the following footnote:

> "On May 27th, 1938, Paraguay sent the Secretary-General of the League of Nations the text of a decree announcing the withdrawal of its declaration of acceptance, which had been made unconditionally. The Secretary-General circulated copies of this communication to States parties to the Protocol of Signature of the Statute of the Permanent Court of International Justice and to the Members of the League of Nations. Express and formal reservations on the subject of this denunciation were received from a number of States (see Series E, No. 15, p. 227, *Publications of the Permanent Court of International Justice*)." (*I.C.J. Yearbook 1946-1947*, p. 211.)

However, from the *Yearbook 1959-1960* onwards, the declaration has been omitted. The United States Counter-Memorial (**II**, para. 369) seeks to give a certain significance to this omission and it states that "there has been no objection to the removal of Paraguay from the *Yearbook*" (*ibid.*). Mr. President, I have no doubt that it will not have escaped the Court's notice that on this occasion my distinguished opponents are prepared to allow that the inclusion or omission of Declarations in the *Yearbook* of the Court may be relevant.

C. Australia, Canada, France, India, New Zealand, South Africa and the United Kingdom (1939)

The third instance involves the action of France, the United Kingdom, and five other Commonwealth States, in September 1939, when they notified the Secretary-General of the League that they would "not regard their acceptances of the Optional Clause as covering disputes arising out of events occurring during the present hostilities" (see League of Nations, *Official Journal*, 1939, pp. 407-410; *ibid.*, 1940, p. 44).

None of the States concerned had reserved the right of modification and 11 neutral States promptly made reservations in general terms in respect of the legal effect of the action of the belligerents (League of Nations, *Official Journal*, 1939, p. 410; *ibid.*, 1940, pp. 45-47).

The entire episode militates against the United States thesis that there is a right of unilateral modification within the system of the optional clause. The reaction of eleven neutral States clearly indicates a high level of controversy.

It is strange to see that the United States Counter-Memorial (**II**, para. 370) is able to state that "these actions [that is, of the belligerent States] have been approved consistently by subsequent commentators".

Mr. President, in fact, the reaction of authoritative opinion was otherwise. Thus Waldock has this to say:

> "The legitimacy of terminating any declaration otherwise than in accordance with its terms must, on principle, hinge upon the rules governing the termination of treaties. This is borne out by the fact that when France, the United Kingdom, and other Commonwealth States notified the Secretary-General of the League in September 1939 that they would 'not regard their acceptances of the Optional Clause as covering disputes arising out of events occurring during the present hostilities', they formulated the grounds on which they justified their action in a manner strongly to imply that they were invoking the doctrine of *rebus sic stantibus*. At the date in question the declarations of these States were valid for fixed periods which had not yet expired, and they clearly did not consider themselves to have the right unilaterally to terminate or vary their declarations except on principles analogous to those governing the termination or variation of treaties."

And Waldock finishes that passage by saying:

> "Even so, a number of neutral States made reservations in regard to the legal effect of the action taken by these States." (*British Year Book of International Law*, Vol. 32 (1955-1956), p. 244 at p. 265.)

The same view, in a succinct form, appears in *Oppenheim's International Law* (Vol. II, 7th ed. 1952, p. 61, note 2), where the view — presumably that of the editor, Sir Hersch Lauterpacht — is stated that: "in general, unilateral termination of the obligations of the Optional Clause must be regarded as subject to conditions governing the termination of treaties".

The distinguished Dutch lawyer, Professor Verzijl, has described the reservation advanced by France and the other belligerents as "devoid of legal effect". I refer to his *International Law in Historical Perspective*, Volume VIII, 1976, page 411.

The reaction of the highly qualified publicists I have quoted was thus one of doubt and disapproval. Moreover, and more importantly, the general opinion was that the issue of unilateral termination was governed by principles of general international law relating to the termination of treaties. It is significant that in 1939 the seven belligerent States justified their variation of their declarations on grounds which were clearly drawn from the law of treaties.

D. El Salvador (1973)

In the fourth instance the Counter-Memorial (**II**, para. 371) refers to the replacement by El Salvador in 1973 of its declaration of 1921 with a new declaration (*I.C.J. Yearbook 1982-1983*, p. 61). In response, Honduras addressed a note to the Secretary-General, dated 21 June 1974, in which it was stated that "a declaration not containing a time-limit cannot be denounced, modified or broadened unless the right to do so is expressly reserved in the original declaration" (see Rosenne, *Documents on the International Court of Justice*, 2nd ed., 1979, p. 361 at p. 363). In a note dated 6 September 1974 the Government of El Salvador disputed this view of the law (*ibid.*, p. 365).

F. Israel (1984)

The fifth case of a modification or termination invoked by the Counter-Memorial (**II**, para. 372) is the Israeli notification of two particular modifications of its declaration of 17 October 1956 (*I.C.J. Yearbook 1982-1983*, p. 69), in a letter to the Secretary-General dated 28 February of this year. The original declaration provided for termination on notice but made no reference to modification.

Conclusion on State practice

That concludes my review of the State practice adduced by the United States to prove that declarations are "inherently modifiable". It is a very poor crop. The Colombian action of 1936 is generally accepted as the correction of an error in the expression of consent. In two cases the general public reaction was that the withdrawal or modification was invalid in the absence of an express reservation and that any possibility of legal excuse could only be found, if at all, within the principles of treaty law. This was the general opinion in response to the action of Paraguay in 1938, and the action of the belligerent States in 1939.

This leaves only two cases in play: El Salvador in 1973 and Israel in 1984. The action of El Salvador has been challenged in any case by Honduras. These two remaining instances are unimpressive and hardly constitute a consistent practice. Moreover, these two instances do not begin to outweigh the evidence that no less than 27 declarants have expressly reserved a right to terminate or to modify or both of these. If the general opinion of States was that declarations were "inherently modifiable", as the United States contends, 27 declarants out of a total of 47 would not have chosen to make such express reservations.

There is a final observation to be made which is prompted by the way in which the United States Counter-Memorial relies on the rare cases of the inclusion of new or modified declarations, such as that of El Salvador, in the *Yearbook* of the Court Counter-Memorial, (**I**, para. 271). If inclusion in the *Yearbook* is admitted to have a certain probative value in respect of validity then naturally this appreciation must be applicable to the inclusion of Nicaragua's Declaration in the *Yearbook* over a very long period.

3. *The opinion of publicists (doctrine)*

The position of revocability adopted by the United States is massively contradicted by the views of qualified publicists with the distinguished exception of Rosenne, *The Law and Practice of the International Court*, 1965, I (pp. 410-411), and with some degree of approval from Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965 p. 167). In any case, Rosenne's opinion is expressed more or less in passing, and there is very little supporting reasoning.

Mr. President, it is striking that in the many pages of the Counter-Memorial devoted to the subject of modification, writers are quoted not infrequently *but not on the precise issue* of the legality of the right of unilateral modification.

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Stone (*Legal Controls of International Conflict*, London, 1954, p. 127); and

Iglesias Buigues, in the *Austrian Yearbook of Public Law* (*Osterreichische Zeitschrift fur Offentliches Recht*, Vol. 22 (1972), p. 255 at p. 270).

The second group of authorities expressly reject a unilateral right of denunciation, using logic which by implication would tend to exclude a unilateral right of modification and that group *includes*:

Murty, in a chapter in Sorensen's Manual (*Manual of Public International Law*, London 1968, p. 706);

Oppenheim's International Law (Vol. II, 7th ed., by Hersch Lauterpacht, p. 61, note 2).

Verzijl (*International Law in Historical Perspective*, Vol. II, Leyden, 1976, pp. 411, 428);

Bowett (*The Law of International Institutions*, 4th ed., London, 1982, p. 271);

Engel, in his article (*Georgetown Law Journal*, Vol. 40 (1951), p. 41 at pp. 54-59); and

Dubisson, in his monograph on the Court (*La Cour internationale de Justice*, Paris, 1964, p. 194).

4. Conclusion: the thesis of the inherent revocability of declarations refuted

That completes my survey of the State practice and the doctrine on the issue of revocability and modification. These sources provide no support for the United States thesis of the inherent revocability of declarations, and it now remains for me to indicate the irrelevance of some of the other considerations advanced in the United States Counter-Memorial.

In the first place, the Counter-Memorial (**II**, paras. 375-383), relies upon the seisin rule, formulated in the *Nottebohm* case, *Preliminary Objection* (*I.C.J. Reports 1953*, pp. 122-123), as a basis for the suggestion that, prior to the filing of an Application, declarations retain "a variable and unilateral character" (**II**, Counter-Memorial, para. 383).

Secondly, the United States (*ibid.*, paras. 384-401) relies upon the decision of the Court in the *Right of Passage over Indian Territory* case, *Preliminary Objections* (*I.C.J. Reports 1957*, p. 125), on the basis that "the right asserted by the United States in the instant case is in every respect equivalent to that asserted by Portugal . . ." (*ibid.*, para. 384). In the view of the United States the fact that in that case Portugal had expressly reserved the right to vary its declaration did not affect the relevance of this argument. But, of course, it makes a critical difference and the Court in that case did not address the general issue of revocability.

Mr. President, the reliance placed upon the decision of the Court relating to India's First Preliminary Objection in the *Right of Passage* case is strange indeed, for while it is true that the Court did not address the issue of revocability as such, the reasoning of the Court as to the admissibility of the Third Portuguese Condition, that is, the reservation of a right of partial denunciation, would make very little sense if declarants had an inherent right of revocation. The Court's discussion of the principle of reciprocity (*I.C.J. Reports 1957*, p. 144) becomes meaningless if it is assumed that such an inherent right existed. The Court is clearly thinking in terms of a power to make reservations *in pursuance of* the existing Portuguese declaration and not of a general power of revocability or variation (*ibid.*).

The issue of reciprocity will be addressed further in due course, and I can now offer the conclusion to this part of my argument. The conclusion justified by legal principle, and by the preponderance of State practice, and by the literature can only be that there is no general or inherent right of revocability or variation of declarations.

Mr. President, at the end of the day, the validity of the thesis advanced by the United States does not depend upon the answer to the question "Are declarations unilateral or consensual?" or the answer to the question "Does the law of treaties apply?" The thesis of the United States involves subjecting the system of the Optional Clause to a régime of unspecified characteristics which need only satisfy the entirely vague *desiderata* of "flexibility", the phrase which appears in the key passages of the relevant part of the Counter-Memorial (**II**, paras. 355, 387 and 399). The legal régime of the Optional Clause, Mr. President, is not subject to the law of treaties as such, but it does remain subject to those essential legal principles applicable to contractual relations. In this context, the right to modify a declaration must be reserved at the point of commitment, that is, when the declaration is made and the system of the Optional Clause is entered. It is absolutely clear that in the *Right of Passage* case, *Preliminary Objections*, the Court regarded the point of commitment as the date on which a State deposits its declaration of acceptance (*I.C.J. Reports 1957*, p. 146).

In simple terms, it is because the system is built up of obligations which are contractual rather than unilaterally revocable, that the jurisdiction accepted by the declarant is recognized as compulsory in accordance with the terms of Article 36, paragraph 2. As Sir Hersch Lauterpacht saw the position in his work published in 1958 "the situation is not essentially dissimilar from that represented by accession to treaty" (*The Development of International Law by the International Court*, London, 1958, p. 346). And Sir Hersch then stated the corollary. In his words:

> "This being so, there may be some difficulty in accepting without qualification a view — which is not the view of the Court — that declines to apply to a unilateral declaration of acceptance of the undertaking of compulsory judicial settlement the general principles of interpretation of treaties and which attributes decisive significance to the meaning attached to it by the individual declaring State. The Optional Clause of Article 36 (2) of the Statute is actually and potentially the most important source of the jurisdiction of the Court and caution would seem to be indicated lest it be reduced to a purely unilateral undertaking which is subject to a restrictive interpretation divorced from the generally accepted canons of construction." (*The Development of International Law by the International Court*, London, 1958, p. 346.)

The invalidity of the purported modification in accordance with the express terms of the United States declaration

I have now concluded my argument concerning the question of revocability of declarations as a matter of general principle. It remains to establish that *in concreto* the changes intended by the United States note of 6 April are incompatible with the terms of the United States declaration of 1946. This particular operation is based on the following premises.

First, the general principles of treaty interpretation are applicable with certain necessary modifications in the light of the unilateral provenance and drafting of individual declarations as is pointed out in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, p. 105).

Second, a primary approach to interpretation of individual declarations is to seek evidence of the intention of the declarant at the time of depositing the declaration by reference to other evidence external to the declaration itself as was done in the *Temple of Preah Vihear* case (*I.C.J. Reports 1961*, pp. 30-34).

Third, the expression of consent has its own contractual integrity and thus it can only be varied either in accordance with its own terms or as a consequence of some applicable rule of law.

The intention of the United States at the time of making the declaration must be sought first of all, in accordance with the normal principles of interpretation, within the declaration itself. This provides in unequivocal terms for termination on the expiration of a period of six months from the notice of termination. No reference is made to a power of modification, and the common sense indicator of intention must then be the maxim *expressio unius est exclusio alterius*. Moreover, the practice, generally adopted by States making reservations shows that States distinguish between the right of modification and the right of termination.

If reference be made to evidence external to the declaration itself, the incompatibility of the note and the original declaration is confirmed. Thus the note of 6 April itself acknowledges this incompatibility, since it contains the formula "notwithstanding the terms of the aforesaid Declaration". Moreover, when the United States Congress approved the appropriate advice and consent resolution the terms of the declaration were explained precisely on the basis that

> "the provision for 6 months' notice of termination after the 5-year period has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding" (*Report of the Senate Committee, Congressional Records*, Senate, August 1946, p. 10707; Nicaraguan Memorial, Ann. II, Exhibit D, I, p. 442 pp. 315-316).

It is simply unthinkable that this objection should apply to avoiding litigation by termination on notice but not to accomplishing the same purpose by modification on notice.

All the evidence points to a single conclusion: the Note of 6 April cannot possibly be reconciled with the clear terms of the United States declaration of 1946.

General conclusion concerning the note of 6 April 1984

Mr. President, I am now in a position to bring my arguments on the validity of the United States note of 6 April as an attempt to modify the United States declaration to a formal conclusion.

In the first place, the law does not countenance a unilateral right of modification of declarations under the Optional Clause.

Secondly, the declaration of 1946 did not reserve a right to modify and thus it invalidates the purported modification of 6 April by virtue of its express provisions.

In any event, it is clear that the United States did not have much confidence in its assertion that there is an inherent right of unilateral modification and in the result a case is developed in a very eccentric form on the basis, more or less, of reciprocity: although this case is itself closely related to the faulty premise of inherent revocability.

THE UNITED STATES NOTE OF 6 APRIL 1984 AND THE ISSUE OF RECIPROCITY

And so, Mr. President, it remains for me to refute the United States argument based upon the concept of reciprocity, and this refutation will be the final segment of that part of my address which concerns the note of 6 April.

The argument of the United States Counter-Memorial contains the following elements based, or rather purporting to be based, upon reciprocity.

First, it is said that the concept of reciprocity represents what I would call a vague and ambitious set of "fundamental principles of reciprocity, mutuality and equality of States before the Court" (**II**, Counter-Memorial, para. 420).

Second, there is the assertion that Nicaragua's declaration is inherently subject to unilateral termination or modification (*ibid.*, para. 408).

Third, it is said that because Nicaragua's declaration is revocable, under the terms of Article 36 of the Statute, Nicaragua has not accepted the *same* obligation as the United States (*ibid.*, paras. 411-415).

Fourth (and it would seem alternatively to the third element): on the ground of reciprocity it is said that the United States may invoke the limitations upon jurisdiction contained in other declarations; and therefore, "since Nicaragua's declaration must be deemed to reserve implicitly the right of immediate termination, the United States is entitled to exercise such a right vis-à-vis Nicaragua" (*ibid.*, para. 416).

It is fair to say, Mr. President, that this summary of the United States argument makes that argument appear much more coherent and much easier to follow than it is in fact.

The United States Assertion that Nicaragua's Declaration Is Inherently Terminable

In the first place, the United States position involves the assertion that the declaration of Nicaragua is inherently subject to unilateral termination or modification (*ibid.*, paras. 406-410).

This assertion forms part of an argument based upon several fallacies, but for the present two points of criticism may be offered. In the first place, the United States view that declarations are always inherently terminable (which now appears once again as part of the reciprocity argument) is fallacious and the Court has already heard me on that subject.

The second point arises from the argument of the Counter-Memorial (**II**, paras. 406-407) to the effect that the term "unconditionally" in the Nicaraguan declaration has no meaning apart from the context of paragraph 3 of Article 36 of the Statute and therefore the declaration is "simply silent on duration". The supposed result of this is that the declaration is "indefinite" in duration and thus immediately terminable.

Mr. President, one can only admire the boldness of this reasoning. First of all, the term "unconditionally" is not in issue. What is in issue is the interpretation of the declaration as a text. The very general view is that declarations which contain no provision for termination continue in force indefinitely (in contractual terms), but may be terminable in so far as the principles of the law of treaties might justify termination. The absence of a reference to a time-limit is always construed as indicating that the declaration continues in force indefinitely.

Writers take this view of the declaration of Nicaragua, for example Hudson in his book on the Permanent Court (*Permanent Court of International Justice 1920-1942*, 1943, p. 472, para. 458), Rosenne, in his book on the time factor (*The Time Factor in the Jurisdiction of the International Court of Justice*, 1960, pp. 19-20) and Briggs in his well-known lectures on the reservations to the jurisdiction of the Court (*Recueil des cours*, Vol. 93 (1958-I), p. 229 at pp. 271-272).

The fact is that publicists in general do not question the right of a State to deposit a declaration of acceptance without limit of time. Thus, for example, Rousseau, *Droit international public* (V, p. 412). And, of course, the view is commonly expressed that there is no right of unilateral termination unless it has been expressly reserved: this view may be found in O'Connell in his general treatise (*International Law*, 2nd ed., II, p. 1082); in *Oppenheim's International Law*, II, 7th ed., p. 61, note 2) and in Waldock's article in *British Year Book of International Law*, Vol. 32 (1955-1956), page 244 at pages 263-265.

Apart from an express reservation, the question of the termination and modification of declarations is governed by the principles of the law of treaties applicable to the consensual legal relations arising within the system of the Optional Clause. This is the view held by the vast majority of authoritative writers. And the position in terms of the law of treaties is clear. As Lord McNair has said: "There is a general presumption against the existence of any right of unilateral termination of a treaty" (*Law of Treaties*, 1961, p. 493). Such views are entirely familiar. Thus Judge Jennings has written:

> "not all treaties are intended to terminate after some period. Many are made, and intended to be made, in terms of perpetuity. And, indeed, the presumption must be, where no term is contemplated by the treaty expressly or impliedly, that a perpetual agreement was intended. Certainly the principle of *pacta sunt servanda* requires that the law should lean against a right of unilateral termination." (*Recueil des cours*, Vol. 121 (1967-II), p. 237 at p. 565.)

Mr. President, it is also clear that American views on these matters were the same. Indeed, the issue of withdrawal was considered in 1925 with particular reference to acceptance of the jurisdiction of the Permanent Court.

In 1925 Assistant Secretary of State Olds wrote the following to Senator Lenroot in connection with the proposed adherence of the United States to the Permanent Court:

> "There is no implied right in any one party to a treaty to withdraw therefrom at will in the absence of specific provisions for such withdrawal by denunciation or otherwise or unless another party to the treaty has violated it so substantially as to justify its termination. Whilst there can be no question that the United States would have the power to withdraw from the Permanent Court at any time, still distinction between the power to take such action and the propriety thereof can be clearly drawn. I feel, therefore, that to avoid the possibility of future misunderstanding, and particularly to strengthen the regard which should be had for international agreements, an appropriate reservation should be incorporated in the resolution by which the United States adheres to the Statute of the Permanent Court recognizing and reserving the right of the United States to withdraw from the Court."

This statement can be taken as a fair summary of the law of treaties more or less at the time Nicaragua made her declaration. Moreover, this passage was reprinted in Hackworth's *Digest* (V, p. 299); and appears also in Whiteman's *Digest* (XII, p. 348).

The conclusion can only be that both as a matter of legal principle and authoritative opinion the declaration of Nicaragua was made without limit of time, and there can be no legal justification for the view that it is subject to unilateral modification. The materials adduced by the United States Counter-Memorial (**II**, pp. 122-124) do not give any real support to the thesis advanced in that pleading.

The Unfounded Thesis that Nicaragua Has Not Accepted the "Same" Obligation as the United States

There is another proposition offered by the United States Counter-Memorial (**II**, paras. 411-415) no less surprising than the revocability thesis.

The United States pleading states that, since the declaration of Nicaragua does not, like the United States declaration, include a provision for six months' notice, it cannot be said that Nicaragua had accepted the "same" obligation as the United States as required by Article 36 of the Statute.

Mr. President, it is not necessary to spend much time on this completely baseless thesis, which is contradicted by all the authoritative writers, including Hudson (*op. cit.*, p. 465, para. 456), Shihata (*op. cit.*, pp. 149-150), Verzijl (*op. cit.*, pp. 407-408) and Waldock (*op. cit.*, pp. 255-256).

This view is wholly subversive of the system of compulsory jurisdiction and is inimical to the principle of reciprocity as understood by the Court hitherto. In effect it involves a further insupportable attempt to rely upon a limitation in the Respondent's own declaration, and thus it lies outside the ambit of the legal concept of reciprocity.

The Thesis that the United States Benefits from the Right of Immediate Termination Which (It Is Said) Is Implicit in the Declaration of Nicaragua

The third argument advanced in the United States Counter-Memorial under the general heading of reciprocity at least involves an acceptance of the normal scheme of reciprocity. The argument on this occasion is: "since Nicaragua's declaration must be deemed to reserve implicitly the right of immediate termination, the United States is entitled *to exercise* such a right *vis-à-vis* Nicaragua" on the basis of reciprocity (**II**, Counter-Memorial, para. 416). The implication of a right of immediate termination in Nicaragua's declaration is unjustified and this thesis has been rejected already. The issue which it is still necessary to confront is whether, as a matter of legal principle, reciprocity is applicable to time-limits set by States for the duration and termination of declarations made under the Optional Clause.

The general opinion in the literature has been that the principle of reciprocity does not apply to time-limits set by States as to the duration and termination of their declarations. The position is explained with great clarity by Rosenne in his study of *The Time Factor* published in 1960. As Rosenne puts the matter:

> "the principle of reciprocity has no application whatsoever to the question of the entry into force or termination of the title of jurisdiction — that is to the simple element of time in the jurisdiction *ratione personae*. For this question, there must exist an element of mutuality, but this is not the same as reciprocity in the technical sense in which that term is used in relation to the compulsory jurisdiction. The entry into force and termination of the mutual obligations are governed exclusively by the general law of treaties as regards conventional titles of jurisdiction, and (today) by Article 36, paragraph 4, of the Statute as regards declarations accepting the compulsory jurisdiction. In each case the Court has to be satisfied that when the proceedings were commenced both parties were under the obligation to accept the jurisdiction of the Court. That — the factor of mutuality — is a *sine qua non* of the exercise of the jurisdiction and has nothing to do with reciprocity. When Article 36, paragraph 2, of the Statute speaks of 'any other State accepting the same obligation', this must be interpreted as referring to the obligation of judicial settlement in general terms, and not

> to the content or scope of that obligation. This inference may be regarded as established by the decision of the present Court on the first, second and fourth preliminary objections in the *Right of Passage* case decisions reached by very large majorities." (*Op. cit.*, p. 50.)

That is the view of Rosenne.

Very similar views are held by Shihata (*The Power of the International Court to Determine Its Own Jurisdiction*, 1965, pp. 151-153); and by Briggs in his lectures in The Hague course of 1958 (*Recueil des cours*, Vol. 93 (1958-I), p. 229 at p. 249). Moreover, those writers who state that the questions of duration and termination of declarations are governed by the principles of the law of treaties implicitly reject the application of reciprocity (cf. Verzijl, *International Law*, VIII, pp. 411-428).

It is certainly the case that some opinions have been expressed to the contrary. Thus President Waldock in his article in the *British Year Book of International Law* argued for the application of the principle of reciprocity to time-limits (Vol. 32 (1955-1956), p. 244 at pp. 278-279), and this view is given rather tentative expression by O'Connell in his general treatise (*International Law*, 2nd ed., II, p. 1082).

With all due respect, the position adopted by Waldock on this issue goes too far. The assimilation of reservations and time-limits which he urges is unsound. The making of reservations is a contractual matter and involves the common will of the parties, whereas the fixing of time-limits of the declarations themselves is a matter governed simply by the Statute of the Court and the principles of the law of treaties. The confusion of these two issues by way of the idea of reciprocity will have unfortunate consequences.

Moreover, President Waldock expressed his view before the *Right of Passage* case was decided, and the reasoning of the Judgment certainly gives no encouragement to his point of view. Rather the reverse. Thus both Rosenne (*op. cit.*, p. 50) and Briggs (*op. cit.*, pp. 277-278) draw from that case the inference that reciprocity does not apply to time-limits as such.

The conclusion justified by the evidence is that reciprocity is *ex hypothesi* inapplicable to time-limits as opposed to express reservations reserving the power to vary or terminate declarations, and that in respect of such express reservations reciprocity can only operate when a specific act of variation or termination is notified by virtue of the express reservation. And after all, this represents the logic of the Judgment in the *Right of Passage* case (*I.C.J. Reports 1957*, p. 144).

The Logical Difficulties Attending the United States Conception of Reciprocity

In the United States view reciprocity justifies reliance upon a hypothetical limitation in the Nicaraguan declaration, that is the alleged right of modification on notice. As the Counter-Memorial expresses the matter:

> "It would be a 'gross inequality between States' to bind the United States to a six-month notice provision when Nicaragua was not similarly bound. Fundamental principles of reciprocity, mutuality, and equality of States before the Court require that the United States note of 6 April be recognized as immediately effective vis-à-vis Nicaragua." (**II**, para. 420).

These rather fine phrases are invoked to support a remarkably tortuous course of reasoning, which is divorced from any framework of legal principle.

The United States is not invoking a specific reservation or limitation contained in the declaration of the Applicant, it is invoking an actually unexercised "inherent" right of termination which, it says, attaches to all declarations, including that of Nicaragua. But, Mr. President, on this reasoning, the United States note of 6 April did not matter at all, since an inherent right of revocability or modification does not need to be invoked explicitly, though it is obviously necessary to invoke the right in the actual proceedings.

If it be correct to say that there is an inherent right of revocability which is potent even when not exercised, a Respondent State would be perfectly within its rights in invoking the right to avoid jurisdiction by this constantly available escape route, and to do so even after the filing of an Application. For the United States argument is: "since Nicaragua's declaration must be deemed to reserve implicitly the right of immediate termination, the United States is entitled to exercise such a right vis-à-vis Nicaragua" (**II**, Counter-Memorial, para. 416).

Thus, the United States position contains two impressive novelties. First, it involves, by way of *renvoi* to the Applicant's declaration, reliance upon its own reservation. Second, the power to vary which the Applicant is said to have is equated with the actual exercise of a power to vary represented by the Schulz letter. This, Mr. President, is not the geography of reciprocity but of chaos.

This is not an artificial *reductio ad absurdum*, it is a realistic demonstration of the results of the Respondent State's striving for flexibility.

The attempt to utilize "inherent" or "implicit" rights of termination or modification which have not in fact been invoked must produce absurdity, since all respondent States could use such reasoning. And there is a further consideration. The logic of the United States Counter-Memorial would effectively destroy the seisin rule stated for example by the Court in the *Right of Passage* case. In the words of the Judgment in this case:

> "As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the parties in accordance with their respective Declarations." (*I.C.J. Reports 1957*, p. 125 at p. 143.)

Moreover, even when a right of termination or modification has been expressly reserved, the respondent State can only benefit from its own actual act of termination or modification either in accordance with the terms of its declaration or by virtue of an independent legal title. The United States argument would render an express reservation of a right to terminate superfluous, since such a right of termination can be, so to speak, "bounced back" off the declaration of the applicant State. If this process can justify circumvention of an express provision as to termination on notice, then *a fortiori* it renders otiose an express provision allowing for termination with immediate effect. All this is ironical, of course, because the United States had in fact expressly forsworn precisely the course of action adopted in the letter of 6 April, and in the Report of the Senate Committee on Foreign Relations it is expressly stated that the provision for six months' notice "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding" (Nicaraguan Memorial, Ann. II, Exhibit D, **I**, p. 422 — pp. 315-316).

The strange and unfortunate result of the logic of the Counter-Memorial is that not only would declarations be freely revocable but they would always be revocable at the instance of the Respondent State after the filing of the Application. That, Mr. President, is not flexibility, nor is it reciprocity or equality, it is simply unworkable.

What then is reciprocity within the meaning of Article 36, paragraph 2, of the Statute? Saying that it is based upon equality does not help a great deal, since, to have legal value, the concept of equality must be placed within some particular framework or order. Clearly, within the framework of the Optional Clause there is no mechanical equality: in a case begun by Application the Respondent is not in the same position as the Applicant. Moreover, declarations do not have to be uniform and some States are willing to take bigger risks as it were of jurisdiction than others. And as the Court pointed out in the *Right of Passage* case, every State which makes a declaration must take the risk of the filing of an Application on the same day as the deposit of a new declaration by the applicant State (*I.C.J. Reports 1957*, p. 146).

The concept of reciprocity is based instead upon a contractual concept which provides the framework within which States may choose to make commitments and thus to take risks. It is the element of choice which represents the notion of fairness as an element of reciprocity. The other aspect of reciprocity in the present context, and surely the more important, is the contractual aspect. Indeed, the term reciprocity is probably no more than a metaphor for the process by which the contractual relation between two declarations crystallizes with the contingency of the filing of an Application.

The phrases usually employed by the Court and by writers reflect this very practical idea of the formation of a contractual relation.

The following examples are sufficiently representative: "jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it" (*I.C.J. Reports 1952*, p. 103); in the same context the Court refers to the "common ground" accepted by both parties (*ibid.*); and in *I.C.J. Reports 1957* (p. 23), there is a reference to the "common will of the Parties"; Waldock writing in the *British Year Book of International Law* refers to the "highest common factor of the two Declarations" (Vol. 32 (1955-1956), p. 244 at p. 261).

Mr. President, the process of crystallization could be arranged in different ways. Exact coincidence of the term of declarations could be required or the broader of the two declarations could be taken. However, it seems more acceptable and more in accord with the idea of a contractual or consensual obligation, to take the "common ground" accepted by both parties.

It is within this conception of a contractual obligation that the Court in the *Interhandel* case formulated the principle that:

> "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration." (*I.C.J. Reports 1959*, p. 23.)

A series of authoritative commentators have not sought to question this important statement by the Court, and I would refer to the views of: Rosenne in his book, *The Time Factor in the Jurisdiction of the International Court of Justice*, 1960 (pp. 51-52); O'Connell, *International Law*, 2nd edition, 1970, Volume II (pp. 1081-1082); Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, 1965 (pp. 152-153); Verzijl, *International Law in Historical Perspective*, VIII, 1976 (p. 408).

All these considerations demonstrate the general eccentricity of the United States conception of reciprocity.

The Court rose at 12.55 p.m.

EIGHTH PUBLIC SITTING (9 X 84, 3 p.m.)

Present: [See sitting of 8 X 84.]

Professor **BROWNLIE**: Mr. President, Members of the Court, I now come to the concluding section of my argument relating to reciprocity.

General Conclusion on Reciprocity

The United States arguments collide with three substantial obstacles. The first takes the form of the erroneous assumption that the Nicaraguan declaration is inherently terminable or variable. The second obstacle consists in the principle, laid down by the Court, that the respondent State cannot rely upon a limitation contained in its own declaration. And the third obstacle takes the form of the principle that reciprocity does not apply in respect of time-limits and the termination of declarations.

Mr. President, each of these considerations on its own constitutes a refutation of the United States argument based on reciprocity, but the conclusive objections to that argument are to be derived from certain fundamental points of principle.

The first of these points involves drawing a distinction between the two stages in the operation of a declaration of acceptance, both of which involve consensual obligations.

The first stage is that of deposit and at this juncture the framework is established by the terms of the declaration and the provisions of the Statute.

It is at this stage that the *loi-cadre* is established in contractual terms. The questions of entry into force, duration, modification and termination are regulated once and for all by the terms of the declaration. And in consequence, the only possibility of variation or termination outside the express terms of the declaration will arise from the legal principles derived from the law of treaties.

It follows also that after the filing of the Application no change in the conditions of modification or termination can take place. Thus in the *Right of Passage* case the Court was unable to accept the Indian argument that a respondent State could invoke the reservation of a power of variation, even if this had not actually been invoked (*I.C.J. Reports 1957*, p. 144). For the Court the power of variation was a part of the contractual *loi-cadre* and was consistent with the Statute of the Court.

The first stage thus involves a network of consensual relations with other declarants of a general and contingent nature. The second stage in the operation of a declaration involves the measuring of the precise coincidence of obligations subsequent to the filing of an Application. It is at this stage that the contingency envisaged by the making of a declaration comes to pass and a more particular consensual relationship then crystallizes. Here the concept of reciprocity, as I suggested earlier on, is probably a simple metaphor for the process by which a contractual relationship appears in a more concrete form as a result of an Application. At this stage it is appropriate for the reservations and conditions actually existing to be invoked by the respondent State. But a power of variation or termination is just that — a contractual power to vary or terminate. Such a power is only relevant in the context of reciprocity if it has actually been exercised by the Applicant prior to the filing of the Application.

Thus it is the substantive content of the declaration prior to the Application which is the subject of the régime of reciprocity. The right to vary or terminate is part of the first contractual stage, the *loi-cadre*, and is not subject to reciprocity.

I can now move on to the second significant point of principle raised by the application of the condition of reciprocity to time-limits in the declaration of an applicant State. After the filing of an Application, it involves the respondent State exercising, for example, a right of termination — or variation — on notice when, in fact, that right has not been invoked by the applicant State. In consequence, the respondent State would always have a means of escaping jurisdiction. It was precisely in respect of this type of thesis that Briggs observed:

> "The fallacy of this argument lies in the fact that once the Court has acquired jurisdiction, the subsequent termination of a Declaration by notice or expiry is irrelevant. This is the *Nottebohm* ruling, where the Court said, in part: 'An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established' (*I.C.J. Reports 1953*, p. 123). And in the *Right of Passage* case, the Court after this statement, added: 'That statement by the Court must be deemed to apply both to total denunciation, and to partial denunciation as contemplated in the Third Portuguese Condition' (*I.C.J. Reports 1957*, p. 142). Thus the argument of a right of termination on notice based on reciprocity is irrelevant and ineffectual once the Court has acquired jurisdiction." (*Recueil des cours*, Vol. 93 (1958-I), pp. 276-277.)

The United States argument thus ultimately founders upon the very principle upon which the concept of reciprocity is based, that is, the contractual or consensual principle. The measuring of the coincidence of the two declarations must involve the invocation of reservations actually made by the applicant State up to the time of the filing of the Application. This measuring cannot be applied to a mere power to make reservations. To allow the Respondent to invoke such a power in order to legitimate its own otherwise invalid act of variation or termination would be beyond the limits of logic and sound policy. The curious results of such a course would include the equating of a power to vary (of the Applicant) and an actual variation of the declaration of the Respondent. If that can happen, it ceases to matter whether or not the Respondent has purported to make a particular unilateral variation, since on the basis of reciprocity seen in this unusual light there is a power of variation in any case.

General Conclusion

Mr. President, I have now completed the argument relating to the United States note of 6 April and the issue of reciprocity. It is inevitable that the argument should closely confront a series of technical matters, and as I reach the conclusion of my address to the Court, it will be appropriate to stand back from the materials and to point out some of the larger elements in the picture.

The first of these larger elements is surely the intention of the States making declarations of acceptance. The position of the applicant State is based upon the plain meaning of texts and the integrity of those texts. In contrast, the United States argument involves a convoluted process of reasoning which is aimed at subverting the integrity of both the declaration of Nicaragua and that of the United States.

The text of the declaration of Nicaragua could not be clearer, and its very clarity has been a source of embarrassment to my distinguished opponents. The text of the United States declaration is by comparison long and fairly complex. It contains various elements, all of which were the subject of considerable public debate and commentary. In particular, it includes a very specific provision for termination on six months' notice. This clear provision was intended to anticipate and to prevent precisely such an event as the note of 6 April. That note is a manifest contradiction of the terms of the United States declaration. The so-called modification would involve an *in personam* termination of jurisdiction for two years and would deliberately flout the provision for six months' notice.

In consequence the United States is asking the Court to adopt positions which cannot be reconciled with the clearly expressed intentions of the declarant States presently before it.

I turn to the second of the larger elements in the picture, which is the concept of freedom of choice. There is of course nothing unwholesome about freedom of choice, but it must be expressed within a framework of law, otherwise freedom may become a slack and cynical voluntarism. It is the making of a declaration which represents the freedom of choice which States have; and they are permitted (within the Statute) to design the terms of their acceptance. The position of the United States in this case actually tends to frustrate the choices made by the two declarants. Thus it is contended that both declarants have always had a unilateral and inherent — and I stress inherent — right of variation or termination. This view flies in the face of the expressed intention of the declarants at the time of depositing both the declarations. In the case of the United States declaration, one can ask why a State should specify the period of notice of termination if it has an inherent power of termination.

And so I come to the third of the larger elements in the materials, which must be the rule of law in international affairs.

Mr. President, I stand before the Court as advocate in contentious proceedings and so, of course, I have a partisan role. Moreover, it would be presumptuous to speculate upon the views of the Court. But perhaps one may imagine a professional international lawyer seeing this case from the outside.

He would surely see the original United States declaration as standing for and representing the rule of law in international affairs. Since — whilst that declaration is in certain respects problematical — it nonetheless exists and it is the result of a carefully taken decision to commit the United States to the system of the Optional Clause, and to do so on certain express terms.

And, Mr. President, our colleague seeing this case from the outside would certainly identify the note of 6 April and the forms of special pleading resting upon it as being subversive of the rule of law in international affairs.

In my submission, it follows that both the declaration of Nicaragua and the declaration of the United States are not impaired by an inherent right of modification, and remain valid declarations recognizing the compulsory jurisdiction of the Court.

Mr. President, I thank the Court for their courtesy in the face of my long address, and I would ask you to recognize my colleague, Mr. Chayes.

ARGUMENT OF PROFESSOR CHAYES

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Mr. President, Members of the Court. May it please the Court.

I rise to make a few remarks about the position of the Shultz letter under the United States Constitution. That was thought to be such a hallowed document that even so cousinly a foreigner as Professor Brownlie should not lay hands on it.

Nicaragua's position on this point can be rapidly summarized. The declaration of 14 August 1946 by which the United States accepted the compulsory jurisdiction of the International Court of Justice was treated by all concerned as subject to the constitutional requirement of advice and consent of the United States Senate. So were the attempts made to accept the compulsory jurisdiction of the Permanent Court before 1946 and to alter the terms of the present declaration since 1946. When I say "all concerned" that includes the President then in office, the State Department and the Legal Adviser of the State Department then in office. This much at least seems to be common ground between the parties.

What then is the United States position?

The United States first asserts that the Secretary of State has apparent authority to bind the represented State (that is the United States) and so Secretary Shultz's letter is effective without more. That appears in the Counter-Memorial (II, paras. 422-426.) I suppose that is true enough if we are talking, as the Memorial recites, about his authority to make statements on "current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government in whose name he speaks will adopt on a given question" (II, Counter-Memorial, para. 423). And I suppose that it is also true that no one would ask Mr. Shultz to produce full powers if he showed up for a signing ceremony (*ibid.*, para. 424). But I submit that any experienced diplomat and most informed observers of foreign affairs are well aware that neither the Secretary of State nor the President in whose name he acts has plenary power without legislative concurrence to undertake or vary major international obligations of the United States.

The requirement of Senate approval of important international commitments is a massive fact of contemporary international relations. The absence of such authority was, in the words of the Vienna Convention on the Law of Treaties, "manifest and concerned a rule of law of fundamental importance" (Art. 46 of the Convention).

Second, says the United States, the declaration was not a treaty and was therefore exempt from the constitutional requirement. We have heard a lot today about the nature of declarations, but I think the Senate of the United States understood the matter pretty well. The Senate Committee Report, in a passage already read by Professor Brownlie, said this:

> "While the declaration can hardly be considered a treaty in the strict sense of the term, the nature of the obligations assumed by the contracting Parties are such that no action less solemn or less formal than that required for treaties should be contemplated." (Ann. II, Exhibit D, I, p. 442; p. 320, Nicaraguan Memorial.)

Incidentally, a section of that Senate report entitled "The Constitutional Issues Involved" contains an interesting discussion, fully in accord with Nicaragua's position here and endorsed by the then Legal Adviser, Green Hackworth (**II**, p. 319).

The United States Counter-Memorial tells us that Senate approval was not absolutely necessary. The same result could be achieved by a majority vote of both Houses of Congress (**II**, Counter-Memorial, para. 248). That is true, because as a matter of internal law, an Act of Congress adopting a treaty is equivalent to Senate advice and consent. But it also remains true that the declaration was beyond the power of the President or the Secretary of State to make acting alone. As the Counter-Memorial says: "it was recognized that Congressional participation was required" (*ibid.*, para. 266).

Next, the United States says that even if the President cannot make a treaty, or undertake an international obligation by himself, he can terminate one. I am prepared to say that that has always been the position of the State Department, but it has come under a good deal of questioning lately in Congress and there have been extensive hearings, on treaty termination in 1979, in connection with President Carter's termination of the Treaty between the United States and the Republic of China, excerpts from which you will find in the Memorial, Annex II, Exhibit E (*Hearings on Treaty Termination before the Committee on Foreign Relations of the United States Senate*, 96th Cong., 1st Sess., 1979, **I**, pp. 442-444).

I think myself that the question is an open one under United States law, and we are not likely to settle it here. I want to make only one point in this connection. The United States Counter-Memorial says: "Nicaragua fails to note that this action" — that is, the termination by President Carter of the Treaty between the United States and the Republic of China — "was upheld by the United States courts against a challenge by certain members of the Senate" (**II**, para. 432). Again, I must say I am simply astonished. The case the Counter-Memorial cites for that proposition is *Goldwater* v. *Carter* (617 F. 2d 697 (D.C. Cir. 1979), *ibid.*). That is an intermediate court decision. It was *vacated* and remanded by the Supreme Court of the United States. That is to say, it is null, and has no force as a precedent or a statement of the law. The Supreme Court refused to decide this question and it said the Court of Appeals should have refused to decide it also. So it vacated the Court of Appeals' decision.

Moreover, the debate over the President's power to terminate treaties has always been about whether he had power to terminate the treaty in accordance with its terms. *Goldwater* v. *Carter* concerned President Carter's action in giving, on his own authority, the one-year notice for termination required by the Treaty of Alliance between the United States and the Republic of China. No one, until the present Counter-Memorial, has suggested that the President has lawful power to terminate a treaty in defiance of its terms. Here, as we know, the declaration, by its terms, required six months' notice of termination.

Let me by the way at this point reinforce Professor Brownlie's remarks as to the Senate's position regarding reciprocity. With respect to the six-months notice provision, the Senate report says it "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding" — renunciation of any intention to withdraw our obligation. (Memorial, Ann. II, Exhibit D, **I**, p. 442 — pp. 315-316). I submit that this renunciation of any intention was absolute and unqualified. It would apply to the exercise of *reciprocal* rights of withdrawal as well as to any other. This Court, I need not say, has previously found such a unilateral expression of intent to be conclusive evidence regarding the interpretation of a specific term in a State's declaration. In the *Anglo-Iranian* case the Court relied on a law passed by the Iranian Majlis in 1931 and held that the explanation of the Iranian declaration provided therein was a "decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court". Well, at the time it accepted the compulsory jurisdiction of the Court, the United States Senate renounced any intention of withdrawing its obligation in the face of litigation.

Finally, the Counter-Memorial assimilates termination and modification, I suppose on some sort of view that the greater includes the lesser (**II**, para. 433). Again, the Counter-Memorial has simply turned its back on the position that the State Department and the Government of the United States has repeatedly taken in the past, most recently in April 1979. Then the State Department, through its Legal Adviser said the following, in formal written answers, to questions put by the Senate Foreign Relations Committee in the hearings on Treaty Termination:

> "*Question*. Would you agree that the President is not able to alter the terms of an existing treaty in any significant way without the consent of the Senate?
>
> *Answer*. Yes . . .".

The State Department took the position before the Committee that the President was without power to alter the terms in an existing treaty without the consent of the Senate. The next question:

> "*Question*. If the consent of the Senate is required in the case of a significant amendment to a treaty, why is it not required in the case of the most significant 'amendment' of all — complete termination of all its terms?
>
> *Answer*. Termination of a treaty, which ends an obligation of the United States is not analogous to an amendment of a treaty which changes, extends, or limits an obligation of the United States. Assuming a significant change in a legally binding obligation to another nation, it follows that the Senate should give its advice and consent to such a change. Normally a treaty [read "declaration"] is changed by another treaty [read "declaration"], although the characterization of the amendment may be different (e.g., Protocol)."

You will note, incidentally, that in 1979 the State Department admitted that Senate approval was required for *any* amendment of a legally binding international obligation, whether it changes, extends or *limits* an obligation of the United States. So much for the Counter-Memorial's theory that a modification which limits obligations is somehow easier for the President to accomplish alone, than one which expands obligations.

I apologize to the Court for reading this same exchange, which took place in the Senate Committee, that was printed in the Memorial (Ann. II, Exhibit E, **I**, pp. 442-443). However, the United States has not answered it, or refuted it. It has simply ignored it. And I for one would like to know when and how, between 1979 and the present, the constitutional powers of the President changed.

Mr. President, Members of the Court, I submit that the action by Secretary Shultz — whether considered as an attempted termination of the 1946 declaration and the substitution of a new one, or as an attempted modification of the 1946 declaration — represents an attempted exercise of power manifestly without legal authority that should not be countenanced by this Court.

Now, Mr. President and Members of the Court, I have a pleasant duty. It is with special pleasure that I ask you to recognize Mr. Paul Reichler, of Washington D.C., who 10 years ago was my student at Harvard. He has been representing Nicaragua's legal interests in general for some time, but this is his first appearance in that capacity, or indeed in any capacity, before this tribunal. I ask that you give the floor to Mr. Reichler.

ARGUMENT OF MR. REICHLER

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Mr. REICHLER: Mr. President, Members of the Court. May it please the Court.

My purpose in appearing before the Court this afternoon is to address the contention of the United States, set forth in its Counter-Memorial, that these proceedings must be terminated because of the absence of El Salvador, Honduras and Costa Rica. Before commencing my address, however, I wish to state that it is a distinct honour and privilege for me to appear before this Court, and I am honoured as well to appear in the company of the learned and distinguished jurists at both counsel tables.

The United States Counter-Memorial asserts two different grounds for termination of these proceedings due to the absence of the other Central American States. First, the United States argues that the Vandenberg Amendment — the third of the three reservations to its declaration of August 1946 — deprives the Court of jurisdiction over Nicaragua's Application in the absence of those States. Second, the United States argues that the three States are, to use the United States terminology, "indispensable parties", and for that reason the Application is inadmissible.

While in the normal course it would be preferable to address jurisdictional arguments before those on admissibility, with the Court's permission I plan to reverse the order, and demonstrate first that there is no merit to the United States inadmissibility argument, and second that the Vandenberg Amendment cannot be invoked in this case to preclude jurisdiction over any of the claims in Nicaragua's Application — neither the claims arising under general international law nor the claims arising under multilateral conventions. I have chosen this order because, at the conclusion of my remarks, I will ask the Court to recognize Professor Brownlie once again, who will offer further observations on the United States contention that the Vandenberg Amendment precludes jurisdiction over Nicaragua's claims arising under general international law. This order of addressing the arguments will allow continuity between my observations on the Vandenberg Amendment and those of Professor Brownlie.

The United States Counter-Memorial, Part IV, Chapter I, is captioned: "The Nicaraguan Application Is Inadmissible Because Nicaragua Has Failed to Bring Indispensable Parties Before the Court." The United States argues that El Salvador, Honduras, and Costa Rica are indispensable parties and that, consequently, allowing this case to go forward in their absence would be contrary to "the Court's own 'indispensable party' practice" (**II**, Counter-Memorial, para. 274). At the outset, it must be asked: to what practice of the Court is the United States referring? The term "indispensable parties" is of course a feature of American municipal law. The term is familiar to American lawyers. But the term appears to be alien in this Court. Neither the Statute of the Court nor the Rules of Court mention "indispensable parties" or contain anything resembling Rule 19 of the American Federal Rules of Civil Procedure. Nor does the jurisprudence of the Court include any reference to the term "indispensable parties" or to the concept as described in the United States Counter-Memorial.

The United States purports to find support for its so-called "indispensable parties" argument in the *Monetary Gold Removed from Rome in 1943* case. In fact *Monetary Gold* provides no support for the United States position. The Court is, of course, fully familiar with that case and time need not be consumed here by a repetition of the exposition set out at paragraphs 239 to 249 of Nicaragua's Memorial (**I**). I wish only to read a single excerpt from the Court's Judgment to demonstrate that the present case simply does not fit within the principle enunciated in *Monetary Gold*. The Judgment states in relevant part:

> "The first Submission in the Application [that is, the Application filed by Italy against France, the United Kingdom and the United States pursuant to the *compromis* upon which jurisdiction was based] centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international legal wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania." (*I.C.J. Reports 1954*, p. 32.)

As this portion of the Judgment shows, Albania was not a mere third party whose political or legal interests might have been affected by a decision on the merits. Albania was in fact if not in name the real Respondent to Italy's first submission. That submission consisted of, as the Court said, "a claim by Italy against Albania", requiring the Court to determine whether Albania had committed an international legal wrong against Italy. It was really a bilateral dispute between these two States; and the Court described it in that way: "Italy and Albania were the only two States . . . directly interested."

Thus, in declining to exercise jurisdiction over the first Italian submission, the Court was not deferring to an absent third party with alleged interests in the legal controversy between the Applicant and the Respondent. The Court declined to proceed in the absence of the real Respondent. In the circumstances, and given that Albania had not consented to the Court's jurisdiction, the Italian submission was rendered inadmissable by, to quote the Court, "the well-established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent."

The contrast with Nicaragua's Application against the United States is easily drawn. Nicaragua asserts claims against the United States, and not against any absent State. Relief is sought only from the United States. In order to adjudicate Nicaragua's claims, the Court must determine only whether the United States has committed international legal wrongs against Nicaragua. This is plainly a dispute between Nicaragua and the United States. The United States is not only the named, but also the real, Respondent. The Court is not required to exercise jurisdiction over any absent State.

The United States attempts to portray this case as in part a dispute between Nicaragua and Honduras. Noting that Nicaragua's Application alleges that United States sponsored mercenary forces operate from Honduran territory in conducting military and paramilitary attacks in and against Nicaragua, the United States asserts:

> "It is well-settled that a State that permits its territory to be used for the commission of internationally wrongful acts against another State itself commits an internationally wrongful act for which it bears international responsibility." (**II**, Counter-Memorial, para. 437.)

Nicaragua does not disagree with this statement of the law. But the fact remains that Nicaragua's Application makes no legal claim against Honduras and seeks no relief from Honduras. The Court is not called upon in this case to adjudicate the lawfulness or unlawfulness of Honduras's conduct. The Court can adjudicate Nicaragua's claims against the United States without adjudicating upon the legal responsibility of Honduras.

In these circumstances *Monetary Gold* does not provide any basis for the Court to decline to exercise its jurisdiction. *Monetary Gold* does not hold, as the United States Counter-Memorial argues, that the Court must defer whenever the interests of absent States might be affected by the Court's decision. The Court itself articulated the proper test: "in the present case, Albania's legal interest would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 33). It is not contended by the United States, nor could it be, that the legal interests of El Salvador, Honduras, or Costa Rica would form the very subject-matter of the Court's decision in this case.

Moreover, upon close analysis, the posited interests of these States, that the United States alleges might be affected by a decision, are either non-existent or plainly beyond the scope of any decision the Court could render in this case.

It is worth recalling in this regard that Nicaragua's Application claims that the United States has violated international law by mining Nicaragua's ports and by conducting military and paramilitary attacks in and against Nicaragua by means of a mercenary army created, armed, financed and directed by the United States. Nicaragua seeks relief that would, in effect, require the United States to cease and desist from these activities and compensate Nicaragua for the damages it has incurred.

It need hardly be said that El Salvador, Honduras and Costa Rica do not have, either separately or jointly, a legal right to request that the United States mine Nicaragua's ports, or carry out military and paramilitary activities in and against Nicaragua. Nor has any of these States, in its communications with this Court, claimed such a right or represented that it ever requested that the United States engage in such activities against Nicaragua. Accordingly Nicaragua's claims, as asserted in the Application, do not concern any real or asserted rights of those States.

The concern expressed to the Court by El Salvador and Honduras — Costa Rica has expressed no such concern — is simply that no action be taken by the Court that would curtail their right to receive military and other assistance from the United States. For example, El Salvador's Declaration of Intervention under Article 63, filed on 15 August 1984, for all its allegations about Nicaraguan activity, does not represent that El Salvador has requested the United States to mine Nicaragua's ports or carry out military and paramilitary activities in and against Nicaragua through mercenary forces or otherwise. El Salvador nowhere states that these particular activities — the subject of this lawsuit — are necessary to its self-defence, or constitute a form of legitimate self-defence, nor could El Salvador make such a statement. Rather, El Salvador's stated concern is that there be no preclusion of the economic and military "support and assistance from abroad", including the United States, it has requested in order to defend itself. (Declaration of El Salvador, para. XII.) But Nicaragua's Application does not place in issue El Salvador's right to receive military or economic assistance from the United States or elsewhere. Such a right will not be affected by the Court's decision even if the Court grants all of the relief requested by Nicaragua.

Honduras's letter to the Court of 18 April 1984, submitted to the Court by the United States as Exhibit III, Tab S, during the hearings on interim measures of protection, similarly makes no reference to any legal right or request to the United States concerning the mining of Nicaragua's ports or the carrying out of military or paramilitary activities in and against Nicaragua. Honduras states in its letter that it:

> ". . . views with concern the possibility that a decision by the Court could affect the security of the people and the State of Honduras, which depends to a large extent on the bilateral and multilateral agreements on international cooperation that are in force, published and duly registered with the Office of the Secretary-General of the United Nations . . ." (**I**, p. 309.)

I will read the last words again, since they are the words that the United States excised when it quoted from the Honduran letter at paragraph 286 of its Counter-Memorial (**II**):

> ". . . bilateral and multilateral agreements on international cooperation that are in force, published and duly registered with the Secretary-General of the United Nations, if such a decision attempted to limit these agreements indirectly and unilaterally and thereby left my country defenseless".

The language that the United States excised makes it clear that Honduras's concern, at least in so far as Honduras itself has expressed it to this Court, is that the Court's decision not affect any of its rights under agreements registered with the Secretary-General. Certainly, no such agreement endows Honduras with a right to have the United States engage in the activities complained of in Nicaragua's Application, nor does Honduras so contend.

It is quite obvious that an adjudication of Nicaragua's claims against the United States will not lead the Court "indirectly or unilaterally" to "limit these agreements" — quoting from the Honduran letter — and therefore the Court's decision will not affect the rights asserted by Honduras in any way. Nicaragua's Application does not call upon the Court to limit Honduras's right to receive military and other assistance from the United States or any other State.

The United States would have the Court believe otherwise. The United States contends that Nicaragua's Application would affect "the right of States to provide reasonable and proportionate assistance to friendly States" (**II**, Counter-Memorial, para. 438). As purported support for this interpretation of Nicaragua's Application (**I**), the United States points to paragraph 26 (*g*) of the Application of 9 April 1984. The United States contends that paragraph 26 (*g*) asks the Court to prohibit United States assistance to any nation engaged in military or paramilitary actions in or against Nicaragua, and the United States further contends that this would prohibit the United States from assisting El Salvador's armed forces in taking military action in self-defence against Nicaragua. This is not a correct reading of the cited paragraph of the Application, and it is not what Nicaragua has asked the Court to do.

The language of paragraph 26 (*g*) was deliberately chosen. It tracks the precise language enacted into law by the United States Congress in appropriating $24 million expressly for military and paramilitary activities in and against Nicaragua during the 1984 fiscal year. That law, the Defense Appropriations Act of 1984, reads as follows:

> "During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activity may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual."

These are the very funds that Nicaragua alleges were used in fiscal 1984 to finance the military and paramilitary activities of the United States against Nicaragua. Paragraph 26 (*g*) is intended to prohibit the United States from continuing to support such activities, in and against Nicaragua, either directly or indirectly. Neither that paragraph nor any other part of Nicaragua's Application seeks to interfere with the provision of military or other assistance by the United States to El Salvador or any other State as long as this is not done as a subterfuge, that is, to send money and goods to the mercenary forces by indirect means.

I would like to make one final point on the so-called "indispensable parties" argument advanced by the United States. The United States contends that the three Central American States are "indispensable" because, to quote from paragraph 443 of the Counter-Memorial (**II**):

> "Facts concerning the activities of third States and Nicaragua's actions regarding those States may not be in the possession or control of a party before the Court and cannot legitimately and fully be determined in the absence of such States."

This argument is unpersuasive in the circumstances of this case. In the first place, the Court has ample means at its disposal to obtain factual material from El Salvador, Honduras and Costa Rica if that becomes necessary. See, for example, Article 44 of the Statute of the Court implemented through Article 66 of the Rules of Court. It should not be presumed that any of these States would refuse to honour a proper request from the Court for factual material. It also should not be presumed that any of these States would spurn a similar request from the United States. After all, if, as the United States suggests, its activities in and against Nicaragua are being conducted for the benefit of these States, then surely their interest lies in providing the United States with whatever factual material they have that would help the United States justify its conduct in this Court and avoid a judgment that could prevent it from continuing to act in their benefit.

An "indispensable parties rule" of the type described by the United States may be appropriate in a municipal legal system, such as our American one, where the courts have the power to adjudicate over persons and other entities despite their lack of consent. But such a rule, as applied to an international court, whose jurisdiction depends on the consent of States, would make it most difficult for the court to conduct its business. As the Court stated in its Judgment on Italy's Application to Intervene in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*:

> "In the absence of compulsory intervention, whereby a third State could be cited by the Court to come in as a party, it must be open to the Court, indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interest of the third State 'would not only be affected by a decision, but would form the very subject-matter of a decision'

> (*I.C.J. Reports 1954*, p. 32), which is not the case here." (*I.C.J. Reports 1984*, p. 26.)

Nor, as shown, is it the case here. So much for the so-called "indispensable parties rule".

I will now turn to the Vandenberg Amendment and the United States contention that it precludes jurisdiction over Nicaragua's Application because of the absence of the same three Central American States previously mentioned.

The Vandenberg Amendment was barely touched upon in Nicaragua's Memorial of 30 June 1984. At the time, the United States had not specified whether or on what basis it intended to invoke that reservation in these proceedings. At the hearing on interim measures of protection, last April, counsel for the United States made only one passing reference to the Vandenberg Amendment, in effect stating that it reflected the same principle as the *Monetary Gold* case (I, p. 86). Since *Monetary Gold* was discussed at some length in Nicaragua's Memorial — and since, as I have just discussed, the case provides no support for the United States position on the absent parties — we gave scant attention to the Vandenberg Amendment itself in our Memorial. Furthermore, and quite frankly, because the Vandenberg Amendment reflects such enormous confusion of thought, we did not presume that the United States would invoke it in this case. This, therefore, is our first opportunity to address the United States contentions concerning the reservation, and I will, with the Court's indulgence, address the subject in some detail.

A careful analysis, and in particular, an accurate presentation of the process leading to the adoption of the Vandenberg Amendment and its incorporation in the United States declaration of 1946, demonstrates that the Amendment cannot preclude jurisdiction over any part of Nicaragua's Application.

I must admit, right at the beginning, that I find the text of the Amendment, taken by itself, thoroughly confusing, as have the most eminently qualified publicists for the past 38 years. To give some examples:

Professor Briggs wrote that "the language of the reservation betrays such confusion of thought that to this day no one is quite sure what it means" (*Collected Courses of the Hague Academy of International Law*, Vol. 93, p. 307).

Professor Quincy Wright said that the "interpretation of the proviso . . . is certainly far from clear" (*American Journal of International Law*, Vol. 41, p. 446).

Judge Manley Hudson characterized the Amendment's origins as "a jumble of ideas" and said that "the Senate had no clear intention in this connection" (*American Bar Association Journal*, Vol. 32, p. 386).

Professor Anand concluded that neither the Amendment's "meaning or its implications were fully understood" by the Senate (*Compulsory Jurisdiction of the International Court of Justice*, p. 221).

A study of the text underscores these comments. The reservation purportedly applies to:

"disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to the jurisdiction".

The second clause is obviously surplusage. If the United States specially agrees to jurisdiction, then the jurisdictional basis would be the special agreement, and not the declaration. Neither the declaration itself nor any of the reservations therein would come into play. The clause is without effect. As we shall see from the legislative history of the reservation, which I shall come to in a few moments, that is precisely what the Senate understood when it added the reservation to the United States declaration. Not only the second clause of the reservation, but the first clause as well, were regarded by the Senate as surplusage that effected no substantive change in the terms of the United States declaration.

The first clause of the reservation, textually, is entirely opaque. It is the principal cause of the confusion and consternation that surrounds the reservation. What is meant by the words "affected by the decision"? Does "affected by the decision" mean "bound by it"? If so, then the first clause, like the second, is, in fact, pure surplusage, since, under Article 59 of the Statute of the Court, only parties to the case can be bound by the decisions of the Court. If a State can be deemed "affected" by a decision without being "bound" by it, under what circumstances is it to be deemed "affected"? The text of the reservation, taken by itself, provides no answers to these perplexing questions. Indeed, if "affected" means something other than "bound", the clause would appear to be hopelessly void for uncertainty. The Court would be well within its rights in so deciding. The doctrine of voidness for uncertainty is common to most legal systems and could be applied here by the Court under Article 38 *(c)* of the Court's Statute.

It has been suggested that the first clause of the reservation may operate to preclude jurisdiction in cases arising under multinational conventions unless all parties to the convention are parties to the case. This possibility was expressed by some of the same commentators previously cited, who feared the reservation would operate to nullify the declaration in virtually all cases involving multilateral conventions and advocated before the Senate that the reservation be struck from the declaration. The United States Counter-Memorial rejects this harmful interpretation of the Vandenberg Amendment, however (see para. 255, note 2), and Nicaragua agrees.

As I will show, such an interpretation is manifestly inconsistent with the intentions of those who conceived, drafted and enacted the reservation in 1946, as reflected in the legislative history that led to its enactment. There is thus no reason for the Court, at the urging of *neither* party, to interpret the reservation in such a manner as to vitiate the United States declaration in cases arising under multilateral conventions, including, of course, those arising under the Charter of the United Nations.

Because it is impossible to ascertain the meaning of the reservation from the text alone, a careful analysis of the legislative history is required. Fortunately, there is a well-documented, though brief, official record that reflects the precise concerns to which the reservation was addressed. This record demonstrates that the reservation is in fact pure surplusage and that it does not impose any limitation on acceptance of compulsory jurisdiction by the United States. The sponsor of the Amendment and the gentleman for whom it is named Senator Vandenberg himself explained on the floor of the Senate, in formally proposing the Amendment: "The situation defined in this suggested reservation is the situation which would exist without the reservation." The only other Senator to comment on the Amendment, Senator Thomas, responded by stating: "That is true." No other Senator spoke about the reservation in the floor debates. Thus, the Senate may be taken to have understood that, in enacting the Vandenberg Amendment, no substantive change in the United States declaration accepting compulsory jurisdiction was intended or accomplished.

There is nothing terribly unusual in this. It is not uncommon for a legislature to enact a provision generally regarded as surplusage in order to accommodate certain of its members who feel that additional safeguards or clarifications are desirable. The legislative history of the Vandenberg Amendment corroborates that this is precisely what happened.

The reservation was adopted in direct response to the concern expressed by John Foster Dulles, that acceptance of the Court's compulsory jurisdiction might expose the United States to suits by States that had not themselves accepted compulsory jurisdiction. This concern was, of course, totally unfounded. Article 36 (2) of the Statute of the Court offered complete protection against such suits by limiting the effectiveness of a State's acceptance of compulsory jurisdiction to "any other State accepting the same obligation". But Dulles feared that Article 36 (2) had a loophole that might have exposed the United States to suit by a State that had not accepted the Court's compulsory jurisdiction where that State was part of a group of States suing the United States in a multi-party case, and one of the applicants had accepted compulsory jurisdiction.

Dulles's fear seems, at first blush, almost implausible to anyone familiar with the Court and its Statute. It seems odd that as experienced a lawyer and diplomat as he could read Article 36 (2) as allowing suits against States that had accepted the compulsory jurisdiction of the Court by States that had not accepted it, no matter how restricted the circumstances. Nevertheless, the record leaves no doubt that this was how he read Article 36 (2) or, at least, how he felt the new Court might possibly read it. The record consists of Dulles's own memorandum on the subject which has been submitted to the Court as Annex 106 to the United States Counter-Memorial (**II**); the report of Francis O. Wilcox, assistant to the Senate Foreign Relations Committee, published in the *American Journal of International Law*; the official Report of the Senate Foreign Relations Committee, Annex 107 to the Counter-Memorial (**II**); and the official record of the floor debate in the United States Senate, which was not included as an Annex to the United States Counter-Memorial, but which Nicaragua submitted at the commencement of these hearings as its Exhibit F. The Court will find upon a close review of these sources that Dulles's fear about Article 36 (2) was exactly as I have stated and the Vandenberg Amendment resulted directly from his fear.

Dulles's fear was set out in his Memorandum Covering Acceptance by the United States of the Compulsory Jurisdiction of the International Court of Justice (Ann. 106 to the United States Counter-Memorial, **II**). It is worth reading the relevant part in full, rather than quoting from it selectively as the United States has done at paragraph 257 of the Counter-Memorial.

Dulles's statement appears under the heading "*Reciprocity*". This is significant. Reciprocity among parties before the Court is exactly what Dulles was concerned about. Thus, he begins his statement with the following recommendation: "Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court." This, of course, was already assured by Article 36 (2), as we know. But Dulles was worried that Article 36 (2) might not assure it in all circumstances. This is reflected in his next paragraph, which is labelled "*Comment*":

> "The Court Statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only 'in relation to any other state accepting the same obligation' (art. 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation . . ."

Now comes the part Dulles is worried about:

> "Since the Court Statute uses the singular 'any other state' [he is referring to Article 36 (2)] it might be desirable to make clear that there is no compulsory jurisdiction to submit to the Court merely because one of several parties to such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being

> subject to the Charter provision (art. 94) requiring members to comply with decisions of the Court in cases to which they are a party."

Dulles's focus on Article 36 (2)'s use of the singular rather than the plural explains his thinking; it explains his confusion. For this reason it is unfortunate that this is the portion of his statement that is excised from the United States quotation of the statement at paragraph 257 of the Counter-Memorial (**II**).

Dulles was concerned that Article 36 (2) would have exposed the United States to suit in any case where there was "any other state" — singular — suing the United States that had accepted compulsory jurisdiction, and that as long as this condition was satisfied (that is the presence in the case of one party against the United States accepting compulsory jurisdiction) other States, even though not having accepted the compulsory jurisdiction of the Court, could join in against the United States. Thus, his recommendation that "Jurisdiction should be compulsory only when *all* of the other parties to the dispute have accepted the compulsory jurisdiction of the Court". This was the reciprocity (that is the heading of this section of his Memorandum), that Dulles wanted to guarantee.

Dulles plainly was not worried about suits in which all of the parties before the Court had made declarations accepting the compulsory jurisdiction of the Court — which is the situation we have here. Rather, his concern was that a party to a dispute before the Court might not have accepted the Court's compulsory jurisdiction. Furthermore, Dulles clearly was not troubled by the rights or interests of absent third parties. He was only protecting the United States, he thought, from suits involving States which had not accepted compulsory jurisdiction. He was concerned, by his own definition, with reciprocity. He referred to claims under multilateral conventions because it was in this context that multi-party suits were most likely to arise.

Dulles's Memorandum was understood at the time precisely as I have just described it. This is confirmed by, among others, Francis O. Wilcox, the assistant to the Senate Foreign Relations Committee, to which Dulles's Memorandum was ultimately submitted. Immediately after describing and quoting from the portion of the Dulles Memorandum that I have just examined, Wilcox wrote in the *American Journal of International Law* (Vol. 40, p. 714): "Certainly the United States would not want to place itself in a position where it could be forced into court by a state which had not itself accepted the terms of Article 36."

This is in fact what Dulles was worried about, and Wilcox confirms it. He understood it that way and the Senate Foreign Relations Committee understood it that way.

Wilcox continues:

> "In reply to Mr. Dulles' Memorandum Mr. Charles Fahy, Legal Counsellor of the Department of State, argued that under Article 36 the United States would be bound only with regard to other States accepting the same obligation."

This was the reply of the Legal Adviser to the State Department to Mr. Dulles's concern. His reply, that under Article 36 the United States would be bound only with regard to other States accepting the same obligation, proves again that Dulles's concern was whether the United States might be sued by States that had not accepted the obligation, and it led directly to the adoption of the Vandenberg Amendment.

Continuing with Wilcox:

> "He suggested [referring to Mr. Fahy, the Legal Adviser], however, that if additional safeguards were desired it would be possible to insert an amendment along the lines of the Vandenberg proposal cited above. This suggestion was incorporated in the Report of the Foreign Relations Committee and was later advanced by Senator Vandenberg on the Senate Floor."

Thus, we see that the State Department's Legal Adviser understood Dulles's concern in the way I have been discussing. He also disagreed with Dulles about the need for a reservation. He believed, quite correctly, that Article 36 (2) already assured the full reciprocity Dulles wanted to guarantee. He proposed the language that resulted in the Vandenberg Amendment only as an "additional safeguard". It should be noted, parenthetically, that Wilcox himself goes on to propose a different interpretation of the Vandenberg Amendment. But he does not pretend that his proposed interpretation is at all responsive to Dulles's concerns or supported in the legislative history. Wilcox is merely trying, like others before and after him, to impute some sense to the text that would render it neither destructive of the declaration nor superfluous.

Returning to the legislative history, the Senate Foreign Relations Committee recommended enactment of the United States declaration accepting the Court's compulsory jurisdiction *without* the Vandenberg Amendment. This was because, as the State Department's Legal Adviser had concluded, the protection already afforded by the Statute of the Court rendered Dulles's concern unfounded. The Committee Report specifically stated with regard to Dulles's concern that:

> "The Committee considered that article 59 of the Court Statute removed all cause for doubt by providing: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'." (*Senate Report 1835*, 79th Congress, 2nd Session (**I**, p. 316), Ann. 107 to the United States Counter-Memorial, **II**, p. 496).

The United States Counter-Memorial at paragraph 273, note 1, states that:

> "The United States Senate drafters were aware of the effect of Article 59 . . . and concluded that Article 59 was insufficient to protect the rights of the United States in disputes arising under multilateral conventions."

That says just the opposite of the excerpt from the Senate Foreign Relations Committee Report that I just read.

Despite the fact that the Senate Foreign Relations Committee saw no basis to, and thus no *need* to respond to Dulles's concern, it added the following comment in its report, again from Annex 107 to the United States Counter-Memorial (**II**): "Mr. Dulles's objection might possibly be provided for by another subsection in the first provision of the resolution." There then followed the precise language that was later adopted as the Vandenberg Amendment. It was, by its own terms, expressly intended to accommodate Dulles's concern (we have seen what that is) and nothing more.

Senator Vandenberg himself described his amendment as an effort to accommodate Dulles's concern. And he clearly described Dulles's concern, as he understood it, as relating to the possibility that in a "multilateral case" — those are the words used by Senator Vandenberg, a "multilateral case" — the United States might be bound to submit to the Court's jurisdiction notwithstanding the presence of other parties that had not accepted the jurisdiction. His statement on this point, delivered in a colloquy with Senator Thomas, is quite revealing. As reported in the *Congressional Record* of 1 August 1946, p. 10618, Exhibit F of the exhibits that Nicaragua submitted at the outset of these hearings, the Colloquy between Senators Thomas and Vandenberg is as follows:

> "*Mr. Vandenberg.* If the Senator will bear with me for a moment longer, I will say that I think we are all in agreement as to the objective we are seeking; but of course, it is highly important that we should be sure we have reached the objective. Mr. Dulles, who certainly is one of the great friends of international jurisprudence, as the Senator knows, has raised a question whether the language of the resolution [that is, the United States declaration as it stood when it was pending before the Senate] might not involve us in accepting jurisdiction in a multilateral dispute in which some one or more nations had not accepted jurisdiction. It is my understanding that it is the opinion of the Senator from Utah that if we confronted such a situation we would not be bound to submit to compulsory jurisdiction in a multilateral case if all of the other nations involved in the multilateral situation had not themselves accepted compulsory jurisdiction. Is that so?
>
> *Mr. Thomas* of Utah: That is surely my understanding. I think reciprocity is complete. All the parties to the case must stand on exactly the same foundations, except that we may waive a right." (*Infra*, p. 317.)

Here again, the concern is, as Senator Thomas responds to Senator Vandenberg, with full reciprocity among "all the parties to the case".

Senator Vandenberg then reads into the record the language of his proposed reservation — the Vandenberg Amendment — and states: "As I understand the Senator from Utah, he agrees with me that the situation defined in this suggested reservation is the situation which would exist without the reservation." In other words, it changes nothing. Senator Thomas responds: "That is true . . ." (*infra*, p. 317.)

This critical exchange on the Senate floor is not even mentioned or cited in the United States Counter-Memorial. It is conspicuous by its absence.

That is the entire legislative history of the Vandenberg Amendment. It shows that the Amendment was conceived, intended and enacted to deal with a specific situation — a multi-party suit against the United States that included parties that had not accepted the Court's compulsory jurisdiction. Its sole purpose was to enable the United States to avoid adjudication in such a case. It was, of course, superfluous — as Senators Vandenberg and Thomas, the Foreign Relations Committee and the State Department's Legal Adviser all concluded. But, out of deference to John Foster Dulles — after all, he had been adviser to the Department of State in relation to the Dumbarton Oaks proposals and adviser to the United States delegation at San Francisco — they agreed to add the reservation to the United States declaration as an "additional safeguard". This explains why the text is so confusing. It was drafted to cure a problem that the drafters knew did not exist.

The Court adjourned from 4.25 to 4.40 p.m.

There is, as we have seen, absolutely nothing in the entire legislative history of the events leading to the enactment of the Vandenberg Amendment to suggest, even remotely, that the reservation might apply to suits in which all of the parties have accepted compulsory jurisdiction. Quite the contrary. The recommendation in Dulles's Memorandum was that jurisdiction be compulsory over the United States where all of the other parties before the Court have likewise accepted it.

Nor is there anything whatsoever in the legislative history to suggest — even remotely — that the Amendment was intended to protect the interests of absent parties, parties other than the United States, that might be affected in some way by the Court's decision. That never entered into the picture at all.

Now let us look at how the United States in this case interprets the Vandenberg Amendment. The United States argues in its Counter-Memorial that the Amendment was intended to permit the United States to avoid compulsory jurisdiction even though all the parties to the case may have accepted jurisdiction. This can be done, the United States Counter-Memorial argues, whenever there are States, not parties to the case, which may have interests in the litigation. The United States now says that the Vandenberg Amendment was intended to protect the United States from having its interests adjudicated in the absence of other States that might have interests in the litigation, and to protect the interests of such absent States. There is no support for this interpretation anywhere in the legislative history, as I have just shown.

The United States asserts at paragraph 258 of its Counter-Memorial (**II**) that:

> "The drafters concluded that, in cases when all affected treaty parties were not, and could not be brought by the United States, before the Court, the United States itself should not consent to have its rights and obligations adjudicated."

But there is no citation to the legislative history for this assertion. And it is demonstrably untrue. This was not Dulles's conclusion, as we have seen. Nor was it the conclusion of Mr. Fahy, the State Department's Legal Adviser. Nor of the Senate Foreign Relations Committee. Nor of Senator Vandenberg or Thomas. All considered Dulles's concern unfounded. They supported the Amendment as nothing more than an additional safeguard, that is, comforting words.

At paragraph 260, the United States Counter-Memorial (**II**) states:

> "The concern voiced by Mr. Dulles and by various members of the Senate Foreign Relations Committee that adjudication in the absence of all affected parties posed substantial risks for the United States was shared in the Senate at large."

Again, there is no citation. And, again, this was not the concern voiced by Dulles, or the Senate Foreign Relations Committee, which recommended acceptance of the declaration *without* the Vandenberg Amendment. There was no mention whatsoever of absent parties by any of these people. So far as the Senate at large is concerned, only two Senators commented on the reservation, neither of which referred to absent parties or thought it limited the terms of the declaration in any way.

At paragraph 270 of the Counter-Memorial (**II**), the United States contends that the Vandenberg Amendment

> "evolved from a longstanding United States practice with respect to international arbitration generally and was drafted in response to specific concerns as to how bilateral aspects of multilateral disputes might come before this Court."

The short and fully dispositive answer to this contention is that the legislative history again is completely devoid of any reference, direct or indirect, to any such long-standing practice or any such concerns as to the bilateral aspects of multilateral disputes. There is nothing whatsoever to suggest that Mr. Dulles, Mr. Fahy, the Senate Foreign Relations Committee or Senator Vandenberg or Thomas gave this any thought at all.

The "long-standing practice" referred to by the United States, we are told, consists of the United States practice with respect to bilateral arbitration treaties, its experience concerning a decision by the Central American Court of Justice at the beginning of this century, and a portion of the Senate debate on United States membership in the Permanent Court of International Justice. None of these experiences is mentioned anywhere in the legislative history of the Vandenberg Amendment. And, in any event, it is highly improbable that any of these experiences would have led the United States to conclude that it should avoid international adjudication whenever there are absent parties with a possible interest in the adjudication, as the United States now claims.

The bilateral treaties referred to by the United States were just that. Bilateral treaties. Their purpose was to resolve bilateral disputes. They were never intended as vehicles for resolving multilateral disputes. Thus it is no surprise, and not at all relevant here, that they would exclude from arbitration all claims affecting the rights or interests of third States. By contrast, the International Court of Justice exists to adjudicate multilateral as well as bilateral disputes. There is no reason to presume that the United States would impose the same restrictions on its submission of multilateral disputes to the Court as it would impose in the altogether different context of bilateral arbitration treaties. Moreover, few if any of these bilateral arbitration treaties, cited in the Counter-Memorial, ever resulted in any arbitrations. And the standard clause excluding claims involving the rights of third States was never, as far as we can tell, construed or even applied.

The case before the Central American Court of Justice — involving Nicaragua, El Salvador and Costa Rica, ironically — is most unlikely to have motivated the Senate to enact the Vandenberg Amendment. A multilateral treaty reservation would not have been a reaction to the adjudication before that Court for the simple reason that even had the United States recognized the jurisdiction of that Court, and even had it included a similar multilateral treaty reservation, that reservation would have been without effect in the case cited by the United States. First, the reservation is only effective if the United States is a party to the adjudication. It would not have prevented the Central American Court from adjudicating those disputes between Nicaragua and Costa Rica and Nicaragua and El Salvador because the United States was not a party. Second, the treaty upon which the United States relied in making its objection and its criticism of the adjudication by that Court — the Bryan-Chamorro Convention of 5 August 1914 — was in fact a bilateral treaty between the United States and Nicaragua. It was not even a multilateral treaty; so, again, the reservation would have had no effect.

The third example of "longstanding practice" we are given is the Senate's consideration of United States membership in the Statute of the Permanent Court of International Justice. This also would not lead anyone to have proposed anything resembling the Vandenberg Amendment. The United States refers at paragraph 265 of the Counter-Memorial (II) to the Senate's consideration of a proviso that would have prevented the Court from rendering an advisory opinion, absent United States consent, in any dispute in which the United States had claims or interests. Merely to state the example is to demonstrate its irrelevance. The United States was concerned there and then about *its* interests being adjudicated in *its* absence. It was not concerned about suits in which it was a party, which are the only suits in which the multilateral treaty reservation could have any applicability.

Thus, neither the legislative history of the Vandenberg Amendment, nor the so-called "longstanding United States practice with respect to international arbitration generally" supports the interpretation of the Amendment posited by the United States in its Counter-Memorial. There is no basis for believing that the Amendment reflected concern over — as the United States now says — adjudication of multilateral disputes in the absence of a State whose interests could be affected — whatever that word means — by the Court's decision. Furthermore, the interpretation now advanced by the United States would establish a thoroughly unworkable standard and make the Vandenberg Amendment even more confusing than it already is. Under what circumstances is a State not a party to a case, deemed "affected" by the decision? Are there certain kinds of interests that must be "affected" for the reservation to apply? Must these interests be "affected" beyond a certain theoretical or *de minimis* extent? If so, what is the standard? The Counter-Memorial is as silent as the text of the reservation itself and leaves these questions unanswered precisely because they are unanswerable. The United States interpretation of the reservation is unsatisfactory for this reason — its construction of the amendment into an even more unworkable problem — as well as the lack of foundation for this interpretation in the legislative history or the so-called long-standing United States practice.

By contrast, Nicaragua's interpretation — that the Vandenberg Amendment was intended to provide an additional safeguard to protect the United States against suits involving States that have not accepted the Court's compulsory jurisdiction — has the advantage of being fully supported by the legislative history, and of avoiding continuing — indeed, unending — problems over the uncertainty of the reservation and its application to future disputes.

It may be difficult for some lawyers to read a Statute or a reservation or words of any kind and conclude that they are or should be deemed without meaning. It is not an easy thing for a lawyer to do. But the legislative history and common sense tell us that that is precisely what ought to be done in the case of the Vandenberg Amendment. It was designed as an additional safeguard, as a clarification, to address a problem which the drafters and the enactors of the provision believed not to exist. And that explains in large degree why it appears so confused and why in fact it is surplusage.

What emerges clearest of all is that the Vandenberg Amendment was conceived, drafted and enacted to avoid prejudice to the United States. It was not in any way intended to protect the interests of other States, whether present in the case or absent. Yet nowhere in its lengthy discussion of the Amendment does the United States Counter-Memorial show how the United States could possibly be prejudiced by adjudication of this case in the absence of El Salvador, Honduras or Costa Rica. In my discussion of the United States "indispensable parties" argument, I showed how the interests of those States would not be prejudiced by an adjudication of Nicaragua's claims. Nor, in fact, would the United States be prejudiced in any way by an adjudication in the absence of these States. The United States makes a very weak attempt to address this problem and to present two examples of possible prejudice. It suggests first that in the absence of El Salvador, Honduras and Costa Rica, it may be denied access to facts and documents in their possession (see the Counter-Memorial, **II**, para. 254). I have already addressed this argument. There is no reason to presume that the United States would not have access to — or, through the Court be able to obtain — facts and documents in the possession of those friendly States. The United States also suggests, in the same paragraph 254 of the Counter-Memorial (**II**), that it could be prejudiced because it would be bound by a decision of the Court while the other Central American States would not. This is a strange argument, indeed. If the United States were to prevail in this case, it certainly would not be prejudiced by the absence of any other States. On the contrary, it would be benefited, in that Nicaragua would be bound by the Judgment as well. If Nicaragua were to prevail, and obtain the relief it has requested, the United States would certainly not be prejudiced by the fact that El Salvador, Honduras and Costa Rica would be beyond the scope of and not bound by the Court's Judgment. Indeed, it would be to the United States advantage that those States, which the United States is purportedly trying to assist, remain free of the binding effect of the Court's Judgment against the United States. Accordingly, even if the Vandenberg Amendment were addressed to concerns about absent parties in disputes under multilateral conventions — which it is not — it could not defeat jurisdiction here because the United States has not shown that it is prejudiced by the absence of any other States and in fact it is not and could not be prejudiced by the absence of any other State.

Mr. President, Members of the Court, I have now completed my presentation.

Before calling upon my distinguished colleague, Professor Brownlie, to demonstrate why, in addition to the reasons I have discussed, the Vandenberg Amendment cannot apply to Nicaragua's claims under general international law, I wish to thank the Court for allowing me the opportunity to appear before it and to state again that it has indeed been an honour and a privilege to address this Court.

And now, I would like to ask you, Mr. President, to recognize Professor Brownlie.

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor BROWNLIE: May it please the Court: with your permission, Mr. President, I shall address the Court on a relatively confined issue presented by the argument of the Counter-Memorial (**II**, pp. 59-65), based upon the Multilateral Treaty Reservation. In brief, the United States contends that the ambit of the reservation excludes the claims of Nicaragua in their entirety, since those claims are exclusively based upon breaches of multilateral treaties. It is my task to indicate the fundamental error of that assertion.

It may be assumed that this issue is one which concerns the substance of the Application and the pleadings and can therefore be decided on the papers, so to speak. However, if this were not the case, the issue could be classified as involving an objection not possessing "an exclusively preliminary character" for the purposes of Article 79, paragraph 7, of the Rules.

Mr. President, it may be convenient if I deal with some preliminary but significant indicators of the general lack of credibility which attaches to this United States argument.

In the first place the terms of the United States declaration give no indication that the Multilateral Treaty Reservation was intended to protect the declarant from claims based upon customary law in case of alternative claims based upon both customary law and treaty provision. Moreover, the report of the Senate Foreign Relations Committee on the acceptance of compulsory jurisdiction expressly refers to the scope of Article 36, paragraph 2, its very wide terms, and quotes the definition of the categories of disputes there to be found (Nicaraguan Memorial, Ann. II, Exhibit D, **I**, p. 442 [illegible] p. 314). These considerations, whilst not conclusive, do not suggest that, in cases of alternative claims, the treaty elements would be predominent in relation to the reservation.

I can now approach the substance of the matter. It is an important premise of the United States argument that the various customary law claims contained in Nicaragua's Application "are all no more than paraphrases of Nicaragua's allegation" of violations of Article 2, paragraph 4, of the Charter (**II**, Counter-Memorial, para. 304). Mr. President, that assertion is unfounded in fact. This is evident from a perusal of the content and structure of the Application and it is not necessary to labour the point. The Application unequivocally divides the claims of Nicaragua into two sets, one based upon breaches of express treaty obligations (Application, **I**, p. 7), and the other set based upon breaches of obligation under customary international law (*ibid.*, p. 8).

Again in the fourth part of the Application eight separate issues are placed before the Court, of which five are unequivocally and exclusively based upon breaches of customary law.

But not only is the assertion of the Counter-Memorial contradicted by the actual contents of the Application, it is based upon a view of the law which is eccentric to say the least. Professional lawyers are familiar with the situation in which the same facts justify invocation of several distinct causes of action, and it is perhaps elementary to point out that violation of treaty provisions is a cause of action distinct from violation of specific duties of customary law. It is hardly necessary to point out that, for example, a claim for injury to the persons of foreign nationals may be simultaneously a breach of a principle of customary international law and a breach of duties under some relevant bilateral treaty, of the type known as Treaties of Establishment or Treaties of Friendship, Commerce and Navigation. Indeed, in the *Interhandel* case the Court may recall that the Court tended to treat a treaty-based claim as actually subordinate to a claim based on general international law, at least in terms of the application of the local remedies rule (*I.C.J. Reports 1959*, pp. 28-29).

The argument of the United States focuses to a great extent upon the ambit of Article 2, paragraph 4, of the United Nations Charter, and it relies upon the assertion that Nicaragua's claims relate in certain ways to breaches of Article 2, paragraph 4, in respect of the prohibition of the use or threat of force (**II**, Counter-Memorial, para. 304 and paras. 317-319).

At this point in the argument the Counter-Memorial appears to move in two directions at once. In the first place, whilst the thinking is somewhat obscure, the supposition is made that a claim which can be founded both upon provisions of the United Nations Charter (or the OAS Charter) and upon customary law principles outside those instruments is to be classified exclusively as based upon a multilateral treaty. This is a major *non sequitur* and involves the errors I have already indicated.

However, the United States argument also takes another course, by no means compatible with the first, and thus it is stated that the provisions of the United Nations Charter constitute customary international law "with respect to questions concerning the lawfulness of the use of force" (**II**, Counter-Memorial, para. 301 and paras. 313-319). Mr. President, there is no reason to disagree with that assessment and it would be easy to add to the sources cited by the United States pleading.

But of course the real question is to see what the consequences of this position are. One of the consequences appears to be that certain parts of the United Nations Charter, as in the case of other multilateral treaties, are at one and the same time both a multilateral treaty and a statement of customary or general international law. Moreover, there are substantial grounds for thinking that the provisions of Article 2, paragraph 4, are declaratory, and such a view is expressed in a book once published by myself (*International Law and the Use of Force by States*, 1963, pp. 279-280). Of course I hesitate to cite my own work, but there are two circumstances which perhaps justify citation on this occasion. In the first place, that work has been cited for various propositions by my distinguished opponents, and secondly it could hardly be said that that book was written apropos this case.

My submission is, Mr. President, that the provisions in the Charter relating to the use of force by States, whilst they may still rank as provisions of a treaty for certain purposes, are now within the realm of general international law and their application is not a question exclusively of interpreting a multilateral treaty. More especially is this so, if it be accepted that the material provisions are declaratory.

In support of this position, I shall with your permission, Mr. President, quote a passage of the well-known essay by Sir Gerald Fitzmaurice (*Symbolae Verzijl*, 1958, p. 153). In his words:

> "If the treaty reflects (codifies) existing law, then, in applying it, the parties merely conform to general law obligations already valid for them. The treaty may state what these obligations are, or define the scope of them, but it does not thereby alter their character as rules of general law to which the parties would be obliged to conform even in the absence of the treaty. In so far as it might purport to do so, it would cease merely to codify and would create not (for reasons already given) new law, but merely new

> particular obligations between or vis-à-vis particular parties. In the case of any provisions of a codificatory character, it is clear that the treaty (even for the parties) declares but does not create the law. It may (as between the parties) create a new basis of obligation to conform to the law, but does not on that account become the formal source of the law, even between the parties — just as, if, in the domestic field, one man were to enter into a contract with another, or subscribe to an undertaking to accord that other certain rights that were in any case due to him under the general law of the country, the contract or undertaking would still not constitute the source of the law thus implemented, though it might be the source of an additional or reinforced obligation to obey it." (*Symbolae Verzijl*, 1958, p. 159.)

Mr. President, no doubt Fitzmaurice was thinking of codifying treaties in a general way, but the views expressed apply equally to the case of particular provisions of a declaratory nature, such as the Charter provisions concerning the use of force by States.

At this point, I turn to a different development of the United States argument concerning customary law. The premise of the development is the assumption that the law relating to the use of force is subsumed in the United Nations Charter and is therefore all governed by a multilateral treaty. On the basis of this premise the thesis is then presented that the various claims formulated in the Application are all caught by the same trap, because, so it is said, they are all encompassed within the concept of the "use of force" (**II**, Counter-Memorial, para. 304).

Thus the United States argument states that the claims in relation to the killing, wounding and kidnapping of citizens, and the infringement of the freedom of the high seas, and indeed all the customary law claims, are mere paraphrases of claims based upon violation of Article 2, paragraph 4, of the United Nations Charter.

This assertion is flawed in three quite separate respects.

First: It ignores the normal technical liberty of Applicant States in framing causes of action in the alternative.

Second: It assumes that all the facts referred to in the Application will fall within the particular concept of the use of force contained in the Charter and that of course is a large assumption — though that particular question is formally reserved by Nicaragua at this stage in the proceedings.

Third: The argument ignores the obvious but important fact that, in the normal practice of States and their international tribunals, perfectly straightforward cases of State responsibility involving violence are formulated or recognized without any reliance, and certainly no exclusive reliance, either upon the provisions of Article 2, paragraph 4, or upon the concept of the use of force as such. A perusal of the pleadings in the *Corfu Channel* case, the *United States Diplomatic and Consular Staff in Tehran* case, and many other such cases would immediately show this to be true.

It is appropriate to take the very simple case of unlawful infringement of the freedom of the high seas and the interruption of peaceful maritime commerce as a consequence of the setting of mines. In its Application Nicaragua employed this cause of action as one which is well recognized by professional international lawyers and which is clearly applicable to interference with vessels on the high seas. Moreover, the cause of action employed is based also on the Judgment of the Court in the *Corfu Channel* case, where reference is made to obligations based on "certain general and well-recognized principles", of which one was "the principle of the freedom of maritime communication" (*I.C.J. Reports 1949*, p. 22).

In conclusion I submit that the Multilateral Treaty Reservation, if indeed it has any relevance or validity in this case, has no application to the claims of Nicaragua based upon customary international law; and, in my further submission, the claims relating to the provisions of the United Nations Charter are for present purposes also based upon customary international law. And in any case the United States Counter-Memorial has clearly recognized that the Charter provisions in question do form part of customary law.

I would thank you, Mr. President and Members of the Court, once more for your patience and courtesy.

Mr. President, it is my pleasure to appear in this case with my French colleague Professor Alain Pellet, and I now ask you to give him the floor.

PLAIDOIRIE DE M. PELLET

CONSEIL DU GOUVERNEMENT DU NICARAGUA

M. PELLET : Monsieur le Président, Messieurs de la Cour, se présenter devant vous pour la première fois est un honneur insigne, c'est aussi une épreuve tout à fait redoutable.

L'honneur est sans doute plus grand encore, et l'épreuve encore plus redoutable, lorsqu'il s'agit d'une affaire présentant l'importance de celle qui vous est soumise aujourd'hui. Ce m'est donc une raison supplémentaire pour vous adresser tous mes remerciements pour l'honneur que vous me faites en acceptant de m'entendre, et pour vous demander toute votre indulgence.

Il m'appartient de réfuter certains des arguments regroupés, de manière quelque peu artificielle d'ailleurs, dans la quatrième partie du contre-mémoire des Etats-Unis consacrée à la prétendue « inadmissibilité » (*inadmissibility*) de la requête.

Les objections, qui, selon les Etats-Unis s'opposeraient à l'« admissibilité » — terme très vague — de la requête du Nicaragua, sont regroupées en quatre chapitres.

M. Reichler a répondu aux objections soulevées dans le chapitre premier et relatives aux droits des Etats tiers qui, selon les Etats-Unis, seraient irrémédiablement affectés par l'arrêt que la Cour sera conduite à rendre dans le présent litige. M. Chayes reprendra la parole demain pour réfuter l'argument selon lequel seul le Conseil de sécurité des Nations Unies aurait compétence pour connaître du différend.

Il m'incombe de traiter des autres arguments avancés dans cette quatrième partie du contre-mémoire des Etats-Unis, et dont les principaux sont les suivants :

i) « Principal organe judiciaire » des Nations Unies, la Cour, si elle se prononçait au fond, romprait l'équilibre des compétences prévues par la Charte entre les différents organes de l'Organisation et, ce faisant, elle reviendrait au surplus sur des décisions qui, d'après les Etats-Unis, seraient d'ores et déjà acquises ;

ii) la Cour s'écarterait des fonctions proprement judiciaires que lui confère la Charte, notamment du fait qu'elle ne pourrait avoir une vue exacte et complète des faits pertinents et que sa décision ne saurait avoir d'effets concrets ;

iii) en outre, l'intervention de la Cour réduirait à néant les efforts de négociation entrepris dans le cadre régional par le groupe de Contadora qui devrait constituer selon les Etats-Unis le cadre exclusif de règlement du différend qui vous est soumis.

Avant de revenir sur chacun de ces points, il m'a paru nécessaire d'aborder le problème général de la « justiciabilité » du litige.

J'aborderai donc d'abord le problème de la « justiciabilité » du litige en général puis je m'interrogerai sur la question de savoir si, en rendant son arrêt, la Cour sortirait de ses fonctions proprement judiciaires et enfin j'examinerai ce que l'on pourrait appeler l'exception de négociations parallèles.

I. LA « JUSTICIABILITÉ » DU LITIGE

L'énumération des principaux arguments des Etats-Unis fait ressortir leur caractère extrêmement disparate. Dans l'argumentation américaine relative à l'« inadmissibilité » (*inadmissibility*) de la requête, voisinent en effet des arguments concernant la recevabilité *stricto sensu* — en particulier celui tiré de ce que j'ai appelé le « non-épuisement des négociations parallèles » ; d'autres arguments portent plutôt sur la compétence de la Cour —, en particulier celui selon lequel le différend ne serait pas « juridique » ; d'autres arguments enfin sont relatifs à la fonction même de la Cour, sa fonction judiciaire, dont il est prétendu que la requête du Nicaragua la priverait.

Cette hétérogénéité n'a du reste probablement pas beaucoup de conséquences concrètes.

Au-delà de ces différences de nature, les arguments, regroupés quelque peu artificiellement dans la quatrième partie du contre-mémoire des Etats-Unis, présentent sans aucun doute des points communs.

Traduisant le souci des Etats-Unis d'échapper à leurs juges — dont ils ont cependant librement accepté la juridiction —, ces arguments — qui semblent tout droit empruntés à un dénombrement effectué dans un article, que les conseils du Nicaragua, au moins, peuvent difficilement ignorer, publié au *British Year Book of International Law* en 1967 et consacré à la « justiciabilité » (*justiciability*) des différends (p. 123-143) — visent en fait à ressusciter la vieille et vaine querelle relative à la distinction entre les différends justiciables et les différends non justiciables, entre les différends juridiques et les différends politiques.

Il serait tout à fait présomptueux, de ma part, de m'apesantir sur la portée d'une querelle qui a fait couler tant d'encre mais que l'on voulait croire dépassée. Puisqu'elle constitue la toile de fond de l'argumentation américaine, il paraît indispensable de rappeler quelques données fondamentales, dans la mesure au moins où elles peuvent avoir un intérêt pour la solution du présent litige.

Tous les arguments que j'ai énumérés il y a un instant tournent autour de l'idée que le différend soumis à la haute juridiction par la République du Nicaragua est trop sérieux pour que la Cour puisse en connaître. *De maximis non curat praetor*...

En réalité, M. Lauterpacht a bien montré, avec son talent et son autorité habituels, que l'expression d'« ordre juridique » (le mot *legal* dans le texte anglais de Statut), employée dans la clause facultative de juridiction obligatoire, « is merely descriptive of these disputes [il s'agit des quatre catégories de différends qui sont énumérées] and does not contain any additional or restrictive qualification » (*The Function of Law in the International Community*, Clarendon Press, Oxford, 1933, p. 201 ; voir aussi p. 35).

Cette notion de « différends d'ordre juridique » été rajoutée dans le Statut de la Cour permanente de Justice internationale sur l'insistance du baron Descamps, président du comité des juristes de 1920, dans un pur souci de continuité terminologique avec les conventions sur le règlement pacifique des différends de 1899 et 1907. Et d'ailleurs cette expression ne retint pas l'attention des diverses instances chargées d'élaborer le Statut de la Cour actuelle.

On est donc conduit à en donner une interprétation « minimaliste » qui semble du reste entièrement confortée par la jurisprudence de la Cour.

Dans son arrêt du 24 mai 1980, relatif au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, arrêt dont j'aurai souvent à faire mention devant vous, la Cour a rappelé que :

> « Les différends juridiques entre Etats souverains ont, par leur nature même, toutes chances de surgir dans des contextes politiques et ne repré-

> sentent souvent qu'un élément d'un différend politique plus vaste et existant de longue date entre les Etats concernés. Nul [ajoute la Cour] n'a cependant jamais prétendu que parce qu'un différend juridique soumis à la Cour ne constitue qu'un aspect d'un différend politique, la Cour doit se refuser à résoudre dans l'intérêt des parties les questions juridiques qui les opposent. La Charte et le Statut ne fournissent aucun fondement [dit toujours la Cour] à cette conception des fonctions ou de la juridiction de la Cour ; si la Cour, contrairement à sa jurisprudence constante, acceptait une telle conception, il en résulterait une restriction considérable et injustifiée de son rôle en matière de règlement pacifique des différends internationaux. » (*C.I.J. Recueil 1980*, p. 20, par. 37.)

La rédaction retenue par la Cour dans cet arrêt récent montre bien que votre haute juridiction n'a aucunement entendu innover, mais qu'elle a agi dans la droite ligne de sa jurisprudence constante, aussi bien en matière consultative qu'en matière contentieuse.

Pour s'en tenir à deux exemples, on peut noter d'une part que, reprenant la position qu'elle avait adoptée dans son avis consultatif relatif à la Namibie (*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, C.I.J. Recueil 1971*, p. 27), la Cour, dans l'affaire du *Sahara occidental*, a fait remarquer :

> « Certes, pour répondre aux questions, la Cour devra établir certains faits avant de pouvoir en évaluer la portée juridique. Mais une question qui présente à la fois des aspects de droit et de fait n'en est pas moins une question juridique au sens de l'article 96, paragraphe 1, de la Charte et de l'article 65, paragraphe 1, du Statut. » (*C.I.J. Recueil 1975*, p. 19, par. 17.)

D'autre part, dans l'affaire relative au *Droit de passage sur territoire indien*, la Cour s'est refusée à entreprendre, au stade des exceptions préliminaires, l'examen d'une objection que l'Inde avait cru pouvoir tirer du caractère prétendument non juridique du différend (*C.I.J. Recueil 1957*, p. 150).

Du reste, il est constant que tant la Cour permanente que la Cour actuelle ont eu, à de très nombreuses reprises, à connaître d'affaires éminemment politiques mettant en jeu des intérêts considérables. On pourrait citer sans doute d'ailleurs toute la jurisprudence de la Cour. Il suffit de penser, à cet égard, aux affaires du *Vapeur* **Wimbledon**, du *Détroit de Corfou*, du *Droit de passage sur territoire indien*, du *Sud-Ouest africain*, de la *Compétence en matière de pêcheries*, du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, bien sûr, et, en ce qui concerne les avis consultatifs, à ceux concernant l'*Union douanière austro-allemande*, l'*Admission d'un Etat comme Membre des Nations Unies*, *Certaines dépenses des Nations Unies* ou le *Sahara occidental*, etc. Suivant en cela la jurisprudence traditionnelle des tribunaux arbitraux je pense en particulier à l'affaire de l'*Alabama* la Cour, dans aucun de ces cas, n'a refusé d'exercer sa juridiction au prétexte que le différend qui lui était soumis ou les questions qui lui étaient posées étaient d'ordre politique ou que son arrêt pourrait avoir une incidence politique.

Cela constitue bien sûr une position de principe très générale, mais, de cette position très générale, la Cour a tiré des conséquences très concrètes dont deux au moins doivent être, je crois, soulignées.

En premier lieu, la Cour considère qu'elle n'a point à s'arrêter aux mobiles qui ont pu inspirer les demandes qui lui sont faites ainsi qu'elle l'a dit dans l'avis relatif aux *Conditions de l'admission d'un Etat comme Membre des Nations Unies*

(*C.I.J. Recueil 1948*, p. 61). Ainsi, dans l'affaire relative au *Cameroun septentrional*, l'argumentation du Royaume-Uni relative aux motivations qui auraient été sous-jacentes à la requête formée par le Cameroun, et que l'on trouve dans la série *C.I.J. Mémoires* aux pages 261 à 265 et 281 à 284, n'a pas retenu l'attention de la Cour. De même, en la présente espèce, la haute juridiction ne saurait s'arrêter aux allégations — du reste erronées, mais j'y reviendrai — du contre-mémoire selon lesquelles la République du Nicaragua tenterait de tenir en échec des décisions d'ores et déjà prises par les organes des Nations Unies ou dans le cadre du groupe de Contadora (**II**, p. 171 et suiv.).

En second lieu, il résulte de la jurisprudence de la Cour que si elle ne peut, bien évidemment, se désintéresser du contexte politique, économique et social des questions qui lui sont soumises, ce contexte ne peut constituer en lui-même l'objet du litige ainsi que cela a été clairement précisé par la Cour permanente de Justice internationale, notamment dans son arrêt du 7 juin 1932 relatif aux *Zones franches de la Haute-Savoie et du Pays de Gex* (*C.P.J.I. série A/B n° 46*, p. 162) ou dans son avis consultatif du 23 juillet 1926 relatif à la *Compétence de l'OIT pour réglementer accessoirement le travail personnel du patron* (*C.P.J.I. série B n° 13*, p. 23). Mais, à l'inverse, en aucune manière, le contexte économique et social dans lequel se situe le différend ne saurait empêcher la Cour de se prononcer sur les différends dont elle est régulièrement saisie.

Ainsi, dans une lettre en date du 9 décembre 1979, le Gouvernement de l'Iran avait soutenu devant la Cour, ou plutôt « loin de la Cour », que

> « la soi-disant question des « otages de l'ambassade américaine à Téhéran » ... ne représent[ait] qu'un élément marginal et secondaire d'un problème d'ensemble dont elle ne saurait être étudiée séparément et qui englobe entre autres plus de vingt-cinq ans d'ingérences continuelles par les Etats-Unis dans les affaires intérieures de l'Iran » ;

et le Gouvernement de l'Iran avait par ailleurs, je cite à nouveau sa lettre,

> « attir[é] l'attention de la Cour sur les racines profondes et l'essence même de la révolution islamique de l'Iran, révolution de toute une nation opprimée contre les oppresseurs et leurs maîtres, et dont l'examen des multiples répercussions relève essentiellement et directement de la souveraineté nationale de l'Iran » (ordonnance du 15 décembre 1979, *C.I.J. Recueil 1979*, p. 11, al. 2 et 4).

Ainsi, dans cette affaire, l'Iran invoquait clairement le contexte pour essayer d'obtenir que la Cour se refusât à examiner les questions juridiques qui lui avaient été soumises par le Gouvernement des Etats-Unis d'Amérique.

En réponse à cette argumentation, la Cour a considéré, je cite l'ordonnance du 15 décembre 1979, « qu'aucune disposition du Statut ou du Règlement n'envisage que la Cour ne doive pas se saisir d'un aspect d'un différend pour la simple raison que ce différend comporterait d'autres aspects, si importants soient-ils » (*ibid.*, p. 15, par. 24), et la Cour a souligné que :

> « Si le Gouvernement de l'Iran estimait que les activités alléguées des Etats-Unis en Iran sont en rapport juridique étroit avec l'objet de la requête, il lui était loisible de développer à ce sujet sa propre argumentation devant la Cour, soit comme moyen de défense dans un contre-mémoire, soit par la voie d'une demande reconventionnelle. » (*Personnel diplomatique et consulaire des Etats-Unis à Téhéran, arrêt, C.I.J. Recueil 1980*, p. 19-20, par. 39.)

Je me permets d'attirer l'attention de MM. les membres de la Cour sur le fait que cette dernière remarque implique du reste que, dans l'esprit de la Cour, il s'agissait, en tout état de cause, d'un problème concernant le fond même du différend, et en aucune manière la compétence.

Comme le Gouvernement de l'Iran en 1979, celui des Etats-Unis aujourd'hui tente d'égarer la Cour en mettant l'accent sur le contexte politique, économique et social, dans lequel, selon lui, se situerait le différend, contexte à la description duquel il consacre une partie presque entière de son contre-mémoire, la deuxième, et sur lequel il revient assez longuement dans le chapitre V de la quatrième partie, pour conclure que les graves problèmes de tous ordres qu'affrontent les Etats d'Amérique centrale sont interdépendants et qu'un prononcé judiciaire

> « would have the inevitable effect of rendering those issues, about which Nicaragua has agreed to negotiate in the course of the Contadora context, largely immune to further adjustment in the course of those negotiations » (**II**, p. 175).

La République du Nicaragua ne méconnait certainement pas l'importance des facteurs économiques et sociaux et des phénomènes d'oppression dans les difficultés rencontrées par les Républiques centraméricaines ; elle éprouve cependant quelque difficulté à comprendre pourquoi et en quoi la solution juridique des problèmes soumis à la Cour pourrait constituer d'une manière quelconque un obstacle au règlement des problèmes globaux qui en effet se posent. Cette argumentation, que les Etats-Unis avaient déjà invoquée lors de l'examen de la demande en indication de mesures conservatoires formulée par le Nicaragua, a, du reste, été implicitement écartée par la Cour dans son ordonnance du 10 mai 1984.

En réalité, loin de constituer un obstacle aux négociations, la solution juridique qui résultera de l'arrêt de la Cour constituera un guide tout à fait précieux pour les négociateurs — en admettant d'ailleurs que les problèmes en cause soient identiques, ce qui est extrêmement discutable, ainsi que je tenterai de l'établir tout à l'heure.

Conformément au dictum célèbre de la Cour dans l'affaire des *Droits de minorités en Haute-Silésie (écoles minoritaires)* :

> « La juridiction de la Cour dépend de la volonté des Parties. La Cour est toujours compétente du moment où celles-ci acceptent sa juridiction, car il n'y a aucun différend que les Etats admis à ester devant la Cour ne puissent lui soumettre. » (*C.P.J.I. série A nº 15*, p. 22.)

Ainsi, la jurisprudence de la Cour confirme pleinement les vues qui avaient été exprimées dès 1930 par sir Hersch Lauterpacht dans son cours à l'Académie de droit international :

> « En fait, à moins d'accepter la doctrine que le droit international n'est capable de régler que les questions d'importance secondaire, il est difficile de voir comment l'importance politique du problème est liée à la question de la possibilité d'aboutir à son égard à une décision juridique. » (« La théorie des différends non justiciables en droit international », *Recueil des cours de l'Académie de droit international de La Haye (RCADI)*, 1930, t. 34, p. 566-567.)

Sir Hersch Lauterpacht a d'ailleurs repris le même raisonnement trois ans plus tard dans son livre, que j'ai cité tout à l'heure, *The Functions of Law in the International Community*.

Dès lors, si la distinction entre les différends politiques, d'une part, et juridiques, d'autre part, a réellement un sens en droit positif — ce dont on peut douter —, celle-ci tient non à l'objet du litige, mais bien aux méthodes de règlement qui sont recherchées. C'est le terrain sur lequel se placent les Etats qui, seul, importe. Comme l'a écrit Charles De Visscher, « il y a un différend, au sens juridique du terme, quand un Etat énonce une prétention qui se heurte sur le terrain du droit à une contestation de la part d'un autre Etat », ceci dans son livre *Aspects récents du droit procédural de la Cour internationale de Justice* (Pedone, 1966, p. 32).

C'est aussi ce qu'a écrit Hans Kelsen :

> « The legal or non-legal, that is political, character of a dispute does not depend on its substance, i.e., the subject matter with respect to which the parties are in conflict, but on the norms which are to be applied to it. The dispute is legal if it is to be decided according to norms of positive law ; it is non-legal, i.e. political, if it is to be decided according to other norms... » (*The Law of the United Nations*, Stevens, Londres, 1950, p. 478.)

Des auteurs aussi divers que sir Hersch Lauterpacht (*The Function of Law in the International Community*, préc., p. 183), que M. Bruns (*RCADI*, 1937, t. 62, p. 611), que M. Marten Bos (*Les conditions du procès en droit international public*, Bibliotheca Visseriana, XIX, 1957, p. 59), que M. Charles Rousseau dans le tome V de son *traité* consacré aux *Rapports conflictuels* (Sirey, 1983, p. 254), que M. Rosenne dans *The Law and Practice of the International Court* (Sijthoff, Leyden, 1965, p. 389), ou que Mme Rosalyn Higgins dans un article publié dans *International and Comparative Law Quarterly* (« Policy Considerations and the International Judicial Process », *ICLQ*, 1968, p. 58 et 74), s'accordent sur ces constatations qu'il n'y a pas de différend politique par nature ou de différend juridique par nature, il y a des litiges que l'on veut régler sur le fondement du droit, il y a des litiges que l'on ne demande pas à régler sur le fondement des règles de droit.

En fait, lorsqu'un Etat accepte, soit a priori, soit a posteriori, qu'un litige ou une catégorie de litiges soient soumis au droit, il fait de ce litige ou de cette catégorie de litiges un différend ou une catégorie de différends d'ordre juridique. Il prend, pourrait-on dire, « le risque du droit » et il ne peut plus, à partir de ce moment-là, se réfugier derrière le caractère prétendument « politique » du différend pour fuir devant l'application de normes juridiques par un tiers impartial.

Dans l'affaire qui vous est soumise, il ressort clairement, aussi bien de l'exposé des motifs que des conclusions de la requête, que c'est bien une solution juridique qui est recherchée par la République du Nicaragua.

S'appuyant sur des règles de droit contenues dans les diverses catégories de sources mentionnées à l'article 38 du Statut de la Cour, les différents éléments des conclusions du Nicaragua coïncident, point par point, avec l'énumération des différends d'ordre juridique que fait l'article 36, paragraphe 2, du Statut. Ceci a d'ailleurs été établi par le mémoire du Nicaragua aux pages 103 et suivantes (I), et les Etats-Unis ne l'ont pas contesté ; il n'est donc pas utile de s'y attarder.

Ni l'importance du différend qui oppose les Parties en litige ni le contexte dans lequel ce différend se développe ne sauraient par conséquent faire obstacle au règlement, par la Cour, du différend que le Nicaragua lui a soumis.

C'est au bénéfice de cette remarque très générale, à laquelle me paraît conduire le raisonnement que j'ai suivi jusqu'à présent, que je m'attacherai dorénavant à répondre de manière plus précise aux arguments présentés dans la quatrième partie du contre-mémoire des Etats-Unis et qui établiraient, selon les Etats-Unis, l'« inadmissibilité » de la requête.

A cette fin, je regrouperai ces arguments en deux grands thèmes.

Dans un premier temps, j'examinerai les arguments selon lesquels l'arrêt que la Cour est appelée à rendre serait incompatible avec l'exercice des fonctions juridiciaires incombant à la Cour et, dans un second temps, je m'attacherai à établir que les négociations en cours, aussi bien au plan régional que dans le cadre des Nations Unies, ne s'opposent en aucune manière à ce que la Cour se prononce sur le fond.

J'en viens donc à la seconde partie de mon exposé.

Elle consistera à tenter d'établir qu'en rendant son arrêt la Cour exercera des fonctions proprement judiciaires.

II. EN RENDANT SON ARRÊT, LA COUR EXERCERA DES FONCTIONS PROPREMENT JUDICIAIRES

Les Etats-Unis consacrent le chapitre IV de la quatrième partie de leur contre-mémoire (II) à tenter de montrer que la voie judiciaire est « par nature incapable » (*inherently incapable*) de résoudre des conflits armés en cours (p. 166-169) et à plusieurs reprises le contre-mémoire des Etats-Unis revient sur cette idée (p. 67 et suiv. et 156 et suiv.).

Il est tout à fait exact, Monsieur le Président, que la Cour a le devoir de conserver son caractère judiciaire. Mais, comme elle l'a rappelé dans son arrêt relatif au *Cameroun septentrional* (*C.I.J. Recueil 1963*, p. 29), c'est à la Cour elle-même et non pas aux parties qu'il appartient de veiller à l'intégrité de la fonction judiciaire de la Cour. Les Etats-Unis s'étant aventurés sur cette voie malgré cette mise en garde, la République du Nicaragua, sans entreprendre de se substituer à la Cour de quelque manière que ce soit, pense néanmoins qu'elle doit donner son sentiment sur les différents points abordés à cet égard dans le contre-mémoire.

Parce qu'il s'agirait d'un conflit armé en cours, il serait inconcevable, selon les Etats-Unis, que la Cour disposât des éléments de preuve indispensables pour trancher le différend et, de toute manière, toujours selon les Etats-Unis, l'arrêt que la Cour est appelée à rendre ne pourrait avoir d'effets pratiques.

En premier lieu donc, le contre-mémoire américain affirme que les Parties ne pourraient fournir à la Cour les éléments de preuve nécessaires à la solution du litige qui lui est soumis et qui concerne un conflit armé en cours, ce que le contre-mémoire américain appelle souvent une situation « fluide ». Les Etats-Unis n'appuient leur démonstration sur aucun texte et se bornent à évoquer, *a contrario* d'ailleurs, les arrêts rendus par la Cour internationale de Justice dans les affaires relatives au *Détroit de Corfou*, d'une part, et au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, d'autre part.

En réalité, il ressort des développements du contre-mémoire (II, p. 166 et suiv.) que c'est moins la nature même du différend qui est en cause que la volonté de la Partie défenderesse d'éclairer pleinement la Cour sur les activités qui lui sont reprochées qui fait clairement défaut :

> « None of the parties to such a conflict can be expected to be prepared [écrivent les Etats-Unis] to disclose to a court potentially probative information that it determines that it must strictly control for reasons of national security. » (II, contre-mémoire, p. 166.)

Si, comme leur défense semble en contenir l'aveu, les Etats-Unis entendent priver la Cour des éléments d'appréciation indispensables, celle-ci devra en tirer les conséquences qui s'imposent, comme l'y invite l'article 53 de son Statut aux termes duquel : « Lorsqu'une des parties ne se présente pas, ou s'abstient de faire valoir ses moyens, l'autre partie peut demander à la Cour de lui adjuger ses conclusions ».

Au demeurant, contrairement aux affirmations des Etats-Unis, le précédent du *Détroit de Corfou* montre bien que, même dans des hypothèses où il s'agit d'un différend concernant un conflit armé, la Cour exerce pleinement et complètement ses fonctions judiciaires. Dans cette affaire, elle a refusé de fonder son arrêt sur des faits qui ne lui semblaient pas suffisamment établis ; elle a, par exemple, constaté que « les faits relatés de science personnelle », par l'un des témoins, ne suffisaient pas « à faire la démonstration que le Gouvernement du Royaume-Uni [croyait] pouvoir y trouver » (*C.I.J. Recueil 1949*, p. 14) et elle a refusé aussi de s'arrêter à certaines « conjectures » du Gouvernement albanais qui n'étaient « appuyées sur aucune preuve » (*ibid.*, p. 15). Au contraire, elle a indiqué que :

> « Conformément à l'article 49 du Statut de la Cour et à [ce qui était alors] l'article 54 de son Règlement [devenu l'article 62], la Cour a demandé à l'agent du Royaume-Uni de produire les documents intitulés XCU pour l'usage de la Cour. Ces documents ne furent pas produits, l'agent arguant du secret naval, et les témoins s'abstinrent de répondre aux questions relatives à ces documents. Il n'est par conséquent pas possible de connaître la portée réelle de ces ordres militaires. La Cour ne peut toutefois tirer du refus de communication de l'ordre en question des conclusions différentes de celles que l'on peut tirer des faits tels qu'ils se sont effectivement déroulés. » (*Ibid.*, p. 32.)

C'est donc à une jurisprudence extrêmement nuancée que s'attache la Cour. Cette jurisprudence montre clairement que la Cour évalue, dans chaque cas, la réalité des faits qui lui sont soumis et n'en tient compte que lorsque ceux-ci lui paraissent suffisamment établis.

Il est vrai que les Etats-Unis contestent que les circonstances qui avaient donné lieu à l'arrêt de la Cour du 9 avril 1949 soient comparables à celles de la présente affaire au prétexte que celle du *Détroit de Corfou* concernait une situation passée alors que la requête du Nicaragua demande à la Cour de se prononcer sur un conflit en cours. Cela appelle deux remarques. D'abord, je viens de rappeler que même dans l'affaire du *Détroit de Corfou* l'agent du Royaume-Uni a refusé, pour cause de secret militaire, de remettre à la Cour certains éléments de preuve. La Cour en a tiré les conséquences. D'autre part, faut-il rappeler que le fait que la situation dont la Cour est appelée à connaître dure encore au moment où elle est saisie n'a jamais empêché celle-ci de se prononcer sur un différend ? Je reviendrai sur ce point, mais je souhaiterais rappeler à cet égard que la Cour n'a pas jugé par exemple que l'extrême tension qui caractérisait les relations entre les Etats-Unis et l'Iran en 1979-1980 devait l'empêcher de statuer sur la requête américaine dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*. Invoquant le précédent du *Détroit de Corfou*, les Etats-Unis avaient expressément demandé à la Cour de se fonder sur des présomptions (« interferences of fact and circumstantial evidence ») (*C.I.J. Mémoires*, plaidoirie de l'agent des Etats-Unis, p. 256-257).

Du reste, ce n'est qu'en présence des preuves fournies par les Parties que la Cour pourra déterminer s'il convient de faire droit ou de ne pas faire droit à la requête du Nicaragua. Comme elle l'a remarqué dans son ordonnance du 10 mai 1984, « la Cour dispose de nombreuses informations sur les faits de la présente espèce, y compris les déclarations officielles des autorités des Etats-Unis » (*C.I.J. Recueil 1984*, p. 182, par. 31). Au surplus contrairement aux allégations américaines (II, contre-mémoire, p. 225), les articles 57 et suivants du Règlement de la Cour donnent à celle-ci des pouvoirs considérables en matière d'instruction et de recherche des preuves. La Cour peut en user autant qu'elle le juge bon et rien, dans les circonstances de l'espèce, ne peut l'empêcher de le faire. La République du Nicaragua, pour sa part, collaborera pleinement à cette recherche.

Le second obstacle qui, selon les Etats-Unis, s'opposerait à ce que la Cour s'acquittât, en la présente espèce, des fonctions proprement judiciaires lui appartenant, tiendrait à l'objet même de la requête qui « alleges an ongoing armed conflict involving the use of armed force contrary to the Charter » (**II**, contre-mémoire, p. 166).

Ainsi que ceci ressort des pages 350 à 354 du contre-mémoire, qui s'emploient à développer cette argumentation, celle-ci porte en réalité sur trois problèmes distincts :

i) Orienté vers le passé, le principe de la *res judicata* serait, par nature, inapplicable dans ce que les Etats-Unis appellent des situations « fluides ».
ii) Une décision judiciaire ne saurait régler un différend consistant en un conflit armé.
iii) Et, en l'espèce, cette inadéquation serait d'autant plus évidente que d'autres personnes et d'autres groupes sont impliqués, qui ne sont pas parties à la présente procédure.

Je ne reviendrai pas sur ce point, déjà traité par M. Reichler. En revanche, j'examinerai successivement les deux autres, c'est-à-dire l'idée que les arrêts de la Cour disposent pour l'avenir et non pour le passé et le fait qu'une décision judiciaire peut régler un différend, même si celui-ci consiste en un conflit armé ouvert.

L'audience est levée à 18 heures

NEUVIÈME AUDIENCE PUBLIQUE (10 X 84, 10 h)

Présents : [Voir audience du 8 X 84.]

M. PELLET : Monsieur le Président, Messieurs de la Cour, après m'être employé à montrer que rien ne saurait s'opposer à la justiciabilité du litige qui oppose la République du Nicaragua aux Etats-Unis d'Amérique, j'ai abordé hier en fin d'après-midi la question de savoir si, en se prononçant au fond sur la requête, la Cour outrepasserait ses fonctions judiciaires.

J'espère avoir établi que l'objection américaine selon laquelle la Cour ne pourrait disposer dans cette affaire des éléments de preuve nécessaires pour la trancher étaient dénuée de tout fondement.

Juste avant la fin de l'audience, j'avais indiqué que la principale raison qui, selon les Etats-Unis, s'opposerait à un prononcé judiciaire en la présente affaire tiendrait à ce que la Cour ne pourrait connaître d'un conflit armé en cours impliquant un usage de la force armée contraire à la Charte.

Laissant de côté le problème des tiers par rapport au présent litige que M. Reichler a déjà largement abordé, j'avais indiqué que, sur ce point, l'argumentation des Etats-Unis s'articule par ailleurs en deux propositions principales que je me permets de rappeler.

Première proposition : selon les Etats-Unis, le principe de la *res judicata* serait orienté vers le passé et par suite serait par nature inapplicable dans les situations que les Etats-Unis disent fluides. Seconde proposition cette proposition est plus large que la première , une juridiction judiciaire ne peut régler un conflit armé ouvert. Monsieur le Président, j'examinerai successivement l'une et l'autre de ces propositions et je m'attacherai d'abord à montrer que, contrairement aux assertions des Etats-Unis, les arrêts de la Cour ont précisément pour vocation de fixer les droits des parties pour l'avenir.

a) *Les arrêts de la Cour, donc, ont pour vocation de fixer les droits des parties à l'avenir*

D'une manière générale, l'ensemble de l'argumentation des Etats-Unis sous-estime gravement la nature et la portée des fonctions judiciaires, mais cette sous-estimation apparaît avec une netteté toute particulière dans la thèse selon laquelle la Cour serait incapable de se prononcer sur une situation en évolution, sur une situation fluide.

Il est fort douteux que la fonction judiciaire, même en admettant qu'elle est dominée par le principe de la *res judicata*, soit, comme l'écrivent les Etats-Unis, « par nature rétrospective » (*inherently retrospective*) (**II**, contre-mémoire, p. 167) ; on peut penser au contraire que les situations sociales évoluent et sont susceptibles de changer encore et que l'objet même d'un prononcé judiciaire est d'essayer de stopper l'évolution ou en tout cas de l'orienter. Cela étant dit, je laisserai de côté ce débat, tout à fait fondamental d'ailleurs, mais qui relève sans doute trop de la philosophie du droit.

Quoi qu'il en soit, c'est, au contraire, lorsqu'une situation est fixée *ne varietur*, lorsqu'il est impossible de rien changer à cette situation, qu'un règlement judiciaire devient impraticable. Dans l'affaire relative au *Cameroun septentrional*, dont nos contradicteurs font grand cas, c'est précisément parce qu'il était impossible de changer quoi que ce soit à la situation en cause et parce que le demandeur, la République du Cameroun, n'attendait d'ailleurs aucune décision de la Cour, au moins aucune décision susceptible d'application, que la haute juridiction a refusé de se prononcer (voir *C.I.J. Recueil 1963*, p. 32 et suiv.).

A l'inverse, la faculté pour la Cour de rendre des arrêts déclaratoires montre, sans aucune équivoque, que ces décisions sont bien tournées vers l'avenir. Ainsi par exemple, lorsqu'elle a été appelée à interpréter son arrêt n° 7, la Cour permanente a précisé que cet arrêt

> «est de la nature d'un jugement déclaratoire qui, selon son idée, est destiné à faire reconnaître une situation de droit une fois pour toutes et avec effet obligatoire entre les parties, en sorte que la situation juridique ainsi fixée ne puisse plus être mise en discussion pour ce qui est des conséquences juridiques qui en découlent» (*Interprétation des arrêts n^{os} 7 et 8 (usine de Chorzów), C.P.J.I. série A n° 13*, p. 20).

Ceci simplement pour montrer que les arrêts de la Cour sont décidément bien tournés vers l'avenir. Cela étant dit, ce n'est pas du tout, Monsieur le Président, un jugement déclaratoire que la République du Nicaragua demande à la Cour de rendre en la présente espèce. Dans les conclusions de sa requête, le Nicaragua prie tout à fait clairement la Cour de se prononcer sur le fondement du droit, sur le caractère illicite des activités qu'elle attribue aux Etats-Unis; le Nicaragua demande à la Cour de dire et juger que ceux-ci ont le devoir d'y mettre fin; et par ailleurs il demande à la Cour de fixer le montant de l'indemnité que les Etats-Unis sont dans l'obligation de payer à titre de réparation. On est évidemment très loin d'un jugement déclaratoire.

Ces conclusions sont de la même nature que celles qui ont été soumises par les parties dans de très nombreuses affaires portées devant votre haute juridiction concernant des situations «fluides», des situations «en cours». Les affaires relatives au *Droit de passage sur territoire indien*, au *Sud-Ouest africain* ou au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* constituent des exemples tout à fait probants d'arrêts qui ont statué sur des situations en cours. Dans tous les cas, comme l'a écrit M. Rosenne, à propos de certains d'entre eux, dans son ouvrage *The Law and Practice of the International Court* (préc., p. 512):

> «The disputes were relatively fluid in the sense that they were in the course of historical evolution when the proceedings were instituted. The proceedings were designed as a measure to prevent further evolution and remove a source of discord between the two States.»

On peut remarquer également que, dans de telles occurrences, la Cour tient fréquemment compte de l'évolution de la situation non seulement jusqu'au moment où elle a été saisie, mais aussi jusqu'au jour même du jugement; ceci apparaît très clairement dans un arrêt qui ne peut laisser indifférent un juriste français, l'arrêt du 20 décembre 1974, relatif aux *Essais nucléaires*. Dans cette affaire la Cour a dit:

> «Etant donné l'objet de la demande, à savoir empêcher de nouveaux essais, la Cour a l'obligation de tenir compte de tout fait intéressant le comportement du défendeur survenu depuis le dépôt de la requête.» (*C.I.J. Recueil 1974*, p. 263, par. 31.)

Et le même procédé a en fait été employé par la Cour dans l'affaire relative au *Droit de passage sur territoire indien* (*C.I.J. Recueil 1960*, p. 29).

Non seulement la Cour peut se prononcer sur des situations fluides mais il convient de considérer que l'arrêt que la Cour est appelée à rendre devra et pourra être exécuté par les parties.

b) *L'arrêt de la Cour pourra et devra être exécuté par les parties*

Poussant plus loin leur raisonnement, les Etats-Unis affirment que l'arrêt que la Cour est appelée à rendre serait insusceptible d'exécution du fait qu'il aurait pour objet de mettre fin à un conflit armé (**II**, contre-mémoire, p. 167).

Indépendamment de la question de savoir si la connaissance de tels conflits est réservée par la Charte à un autre organe des Nations Unies — point que j'examinerai tout à l'heure et sur lequel reviendra M. Chayes —, indépendamment donc de ce problème que je laisse pour l'instant de côté, il convient liminairement de remarquer que l'idée selon laquelle les conflits armés sont exclus de la compétence *ratione materiae* de la Cour n'est jamais, semble-t-il, avant cet instant, venue à l'esprit de quiconque, et en tout cas pas de nombreux Etats qui, comme le Salvador aujourd'hui, assortissent ou ont assorti leur déclaration d'acceptation de la juridiction obligatoire de la Cour d'une réserve concernant (je cite la réserve d'El Salvador, mais d'autres pourraient être citées dans le même sens):

> «les différends se rapportant à des faits ou des situations d'hostilité, de conflit armé, des actes de légitime défense individuels ou collectifs, une résistance à l'agression, le respect des obligations imposées par des organismes internationaux et tout acte, mesure ou situation semblable ou connexe, dans lesquels El Salvador a pu, est ou risque d'être impliqué à quelque moment que ce soit» (*C.I.J. Annuaire 1982-1983*, p. 87, point iv)).

Des pays comme l'Inde, Israël, le Soudan et, d'une manière un peu plus restrictive, le Kenya, le Malawi, Malte et Maurice ont fait des déclarations tout à fait comparables, et cela uniquement pour les déclarations en vigueur, on en trouverait bien d'autres dans le passé. On se demande pourquoi ces pays auraient ressenti la nécessité de réserver la compétence de la Cour en cas de conflits armés, si, de toute manière, la Cour n'avait pas été compétente pour se prononcer sur de tels conflits.

Il est exact que les arrêts rendus par la Cour doivent être susceptibles d'exécution, et que, si cette condition n'est pas remplie, la haute juridiction sortirait de ses fonctions proprement judiciaires, en se prononçant au fond. C'est ce principe, que le Nicaragua ne conteste pas, qui explique la décision de la Cour dans l'affaire du *Cameroun septentrional*.

Mais, comme j'ai déjà eu l'occasion de l'indiquer, la requête formulée par la République du Nicaragua présente des caractères tout différents de celle qu'avait formulée le Cameroun en 1963. Loin d'être «éloignées des réalités», pour reprendre une expression de la Cour (*C.I.J. Recueil 1963*, p. 33), les questions aujourd'hui posées à la Cour sont totalement ancrées dans le réel; loin d'avoir pour seul objet, je cite à nouveau la Cour, «une constatation du manquement au droit», la demande du Nicaragua vise au contraire à dissiper «toute incertitude dans [les] relations juridiques» (*ibid.*, p. 34) entre les Parties.

Cela n'a aucun rapport avec l'affaire que la haute juridiction a tranchée en 1963.

Il est cependant exact aussi qu'il n'appartient pas à la Cour d'opérer «un choix entre les diverses voies» par lesquelles il peut être mis fin à la situation qui est à l'origine du litige, car

> «ces voies sont conditionnées par des éléments de fait et par des possibilités que, dans une très large mesure, les parties sont seules en situation d'apprécier. Un choix entre elles ne pourrait être fondé sur des considérations juridiques, mais seulement sur des considérations de nature pratique ou d'opportunité politique; il ne rentre pas dans la fonction judiciaire de la Cour d'effectuer ce choix» (*Haya de la Torre, C.I.J. Recueil 1951*, p. 79).

Et de même aussi, il est exact que :

> « Lorsque la Cour tranche un différend au fond, l'une ou l'autre partie ou les deux parties sont en fait à même de prendre des mesures visant le passé ou l'avenir ou de ne pas en prendre, de sorte qu'il y a soit exécution de l'arrêt de la Cour, soit refus d'exécution. » (*Cameroun septentrional, C.I.J. Recueil 1963*, p. 37-38.)

Peut-être que les Etats-Unis n'ont pas l'intention de donner suite à l'arrêt que rendra la Cour, mais il est clair en la présente espèce qu'il ne dépend que de l'Etat défendeur de donner suite aux demandes qui font l'objet des conclusions du Nicaragua et dont la Cour est appelée à apprécier le bien-fondé.

Du reste, la conséquence logique de la jurisprudence que j'ai citée il y a un instant est, assurément, que par lui-même un arrêt de la Cour ne règle pas — et n'est pas destiné à régler — toutes les difficultés entre les parties. C'est à elles qu'il appartient de mettre en œuvre de bonne foi le dispositif, éventuellement avec l'aide de tiers, et, si des tiers interviennent, ceux-ci doivent dans cette tâche tenir compte de la chose jugée, comme l'a fait remarquer M. Rosenne (*The Law of Practice of the International Court*, préc., p. 153), s'agissant, par exemple, du Conseil de sécurité.

Cela fait du reste justice de l'idée, avancée par les Etats-Unis, selon laquelle la Cour devrait s'abstenir de se prononcer car :

> « The Court could not exercise the continuous supervision and direction that would be required to assist the Parties in giving effect to such a judgment. Nor does the Court command the personnel, financial and other resources that would be necessary. » (**II**, contre-mémoire, p. 168.)

Ce n'est pas à la Cour qu'il appartient d'exercer cette supervision et cette direction même si elle peut, assurément, être saisie de certaines conséquences de l'inexécution de ses arrêts ou de certaines difficultés dans leur mise en œuvre.

Et quoi qu'il en soit, en tout état de cause, ces difficultés éventuelles ne sauraient empêcher la Cour de se prononcer, comme ceci a été clairement indiqué par la haute juridiction dans l'affaire relative au *Droit de passage sur territoire indien*. En effet, dans cette affaire, la Cour a admis que si satisfaction était donnée au Portugal, de délicates questions d'application pourraient surgir. Mais la Cour a ajouté, et c'est ceci qui importe, qu'à ses yeux cela « ne constituait pas un motif suffisant pour conclure à l'impossibilité d'une reconnaissance judiciaire » du droit qui avait été invoqué par le Portugal sur la base de l'article 38, paragraphe 1, du Statut (*C.I.J. Recueil 1960*, p. 37).

A plus forte raison bien sûr, comme la Cour permanente de Justice internationale l'a déclaré dans l'affaire du *Vapeur Wimbledon*, et comme elle l'a rappelé dans celle relative à l'*Usine de Chorzów*, « la Cour ne peut ni ne doit envisager l'éventualité que l'arrêt resterait inexécuté après l'expiration du délai fixé pour son exécution » (*C.P.J.I. série A n° 17*, p. 63, et *série A n° 1*, p. 32). Il y a, Monsieur le Président, Messieurs de la Cour, décidément, une très grande différence, que les Etats-Unis ne semblent pas voir, ou se refusent à voir, entre un arrêt qui n'est pas susceptible d'exécution (*Cameroun septentrional*), et un arrêt qui n'est pas exécuté, ce qui pourrait advenir par exemple du fait de la mauvaise volonté des Parties. Dans ce dernier cas, la Cour, bien entendu, ne peut envisager l'hypothèse et doit rendre son jugement.

A vrai dire, la discussion amorcée par les Etats-Unis porte largement à faux. Il n'est pas demandé à proprement parler à la Cour de mettre fin à un conflit armé par le seul pouvoir des mots. Ce qui est demandé à la Cour c'est, conformément aux compétences qu'elle tient de son Statut, de déterminer les droits (*the rights*) respectifs des Parties, la République du Nicaragua et les Etats-Unis, et c'est à ces Parties qu'il appartiendra ensuite d'en tirer les conséquences, chacune en ce qui la concerne.

La Cour a maintes fois rappelé qu'elle bénéficiait d'une certaine discrétion pour donner suite ou ne pas donner suite à une demande d'avis consultatif, encore faut-il remarquer qu'elle a toujours usé avec une grande modération de cette compétence discrétionnaire qu'elle déduit des termes de l'article 65 de son Statut. Mais les articles 36 et 38, qui concernent la compétence contentieuse — en tout cas l'article 36 —, n'autorisent certainement pas à transposer en matière contentieuse l'interprétation que la rédaction de l'article 65 impose en matière consultative. Comme elle l'a rappelé dans les affaires relatives aux *Essais nucléaires*, la Cour n'a pas « la faculté de choisir parmi les affaires qui lui sont soumises celles qui lui paraissent se prêter à une décision et de refuser de statuer sur les autres » (*C.I.J. Recueil 1974*, p. 271, par. 57).

Ce n'est pas en donnant suite à la requête de la République du Nicaragua que la Cour porterait atteinte à l'intégrité de sa fonction judiciaire sur laquelle les Etats-Unis veillent avec tant de jalousie. C'est bien au contraire en s'y refusant. Ce faisant, en effet, la Cour priverait les Parties de la possibilité de régler leur différend sur le fondement de règles juridiques dégagées par un organe impartial à la suite d'un débat contradictoire. On s'étonne d'ailleurs que les Etats-Unis, alors qu'ils disent admettre l'autorité et la pertinence du droit international dans le présent litige (**II**, contre-mémoire, p. 168), considèrent que la Cour internationale de Justice dont la mission, aux termes de l'article 36, paragraphe 1, de son Statut, est « de régler conformément au droit international les différends qui lui sont soumis », on s'étonne disais-je, que les Etats-Unis considèrent que la Cour ne constitue pas un for approprié.

J'espère avoir établi, Monsieur le Président, que la fonction judiciaire de la Cour, ne serait menacée que par un refus de sa part de se prononcer.

III. L'EXISTENCE DE NÉGOCIATIONS PARALLÈLES NE FAIT PAS OBSTACLE À LA JURIDICTION DE LA COUR

J'en viens maintenant à la troisième et dernière partie de mon exposé, qui concerne l'existence de négociations parallèles et le point de savoir si l'existence de négociations parallèles fait obstacle à la juridiction de la Cour.

Affirmer comme le font les Etats-Unis, tout au long de la quatrième partie de leur contre-mémoire, que la Cour, parce qu'elle est le principal organe judiciaire des Nations Unies, doit s'abstenir de statuer sur la requête du Nicaragua, relève d'une conception tout à fait singulière et de la notion d'organe des Nations Unies et de celle de fonction judiciaire.

Toute interprétation de la Charte et du Statut de la Cour, qui, aux termes de l'article 92 de la Charte, en fait partie intégrante, doit tenir compte des buts et principes de l'Organisation qui sont énumérés dans les articles 1 et 2 de la Charte. Il se déduit en particulier de cette considération élémentaire que toute mesure pouvant contribuer au maintien de la paix et de la sécurité internationales, qui est le but premier des Nations Unies aux termes du paragraphe 1 de l'article 1, toute mesure pouvant contribuer à cela, donc, bénéficie d'une présomption de licéité.

Comme l'a fait remarquer M. Lachs dans l'opinion individuelle qu'il a jointe à l'arrêt rendu par la Cour dans l'affaire relative au *Plateau continental de la mer Egée* :

> « Le caractère souvent inhabituel des problèmes que doivent affronter les Etats de nos jours oblige à utiliser le plus d'instruments et à se réserver le

> plus de voies possibles pour résoudre les questions complexes et souvent multidimensionnelles qui se posent. Il y a souvent avantage à utiliser plusieurs méthodes, ensemble ou successivement. Il ne faut donc voir aucune incompatibilité entre les divers instruments et tribunaux dont les Etats peuvent user, car ils se complètent les uns les autres. Malgré l'interdépendance des problèmes, on peut isoler certains d'entre eux, leur donner la priorité et essayer de les soumettre à un for distinct. » (*C.I.J. Recueil 1978*, p. 52.)

Ces formules reflètent du reste la jurisprudence constante de la Cour qui, dans le même arrêt, a rappelé que :

> « La négociation et le règlement judiciaire sont l'une et l'autre cités comme moyens de règlement pacifique des différends à l'article 33 de la Charte des Nations Unies. La jurisprudence de la Cour fournit divers exemples d'affaires dans lesquelles négociations et règlement judiciaire se sont poursuivis en même temps. Plusieurs affaires, dont la plus récente est celle du *Procès des prisonniers de guerre pakistanais* (*C.I.J. Recueil 1973*, p. 347), attestent qu'il peut être mis fin à une instance judiciaire lorsque de telles négociations aboutissent à un règlement. [Tel a été aussi le cas dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*.] Par conséquent [termine la Cour], le fait que des négociations se poursuivent activement pendant la procédure actuelle ne constitue pas, en droit, un obstacle à l'exercice par la Cour de sa fonction judiciaire. » (*C.I.J. Recueil 1978*, p. 12, par. 29.)

De même aussi, évoquant, dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, la création d'une commission qui avait été chargée d'établir les faits, la Cour a estimé que :

> « La constitution de la commission par le Secrétaire général avec l'accord des deux Etats ne saurait en aucune façon être considérée comme incompatible en elle-même avec la poursuite d'une procédure parallèle devant la Cour. La négociation, l'enquête, la médiation, la conciliation, l'arbitrage et le règlement judiciaire sont énumérés ensemble à l'article 33 de la Charte comme moyens de règlement pacifique des différends. » (*C.I.J. Recueil 1980*, p. 23, par. 43.)

C'est aussi cette idée que traduit Sibert, en termes plus techniques, lorsqu'il écrit dans son *Traité de droit international public* :

> « Si la concurrence se produit entre un tribunal arbitral et un organisme politique déjà saisi, la seule conclusion juridiquement acceptable est que la litispendance ne doive pas jouer ; en effet, les deux organismes sont d'ordre différent : l'un, le tribunal arbitral, est un juge librement choisi mais dont la décision constate et ordonne ; l'autre est normalement un conciliateur qui suggère et recommande une solution transactionnelle. » (Vol. II, 1951, p. 443.)

En dépit de la position de principe reflétée par la jurisprudence constante de la Cour, les Etats-Unis d'Amérique invoquent une sorte de double exception de litispendance, qui ne veut pas dire son nom : selon eux, la Cour devrait renoncer à se prononcer, au prétexte que l'arrêt qu'elle est appelée à rendre menacerait le succès des négociations engagées dans le cadre du groupe de Contadora, d'une part, et tiendrait en échec les décisions prises au sein des Nations Unies, d'autre part.

a) *Les négociations menées dans le cadre du processus de Contadora*

Le dernier chapitre du contre-mémoire des Etats-Unis développe une véritable exception d'irrecevabilité, tirée de ce que l'on peut appeler le non-épuisement des négociations diplomatiques préalables dans le cadre régional.

De l'aveu même des Etats-Unis, ce cadre est constitué par le «processus de Contadora» dont le mémoire de la République du Nicaragua a donné une description (**I**, p. 418 et suiv.) Or, les Etats-Unis ne participent pas à ce processus.

Même en prenant pour argent comptant l'assurance donnée par les Etats-Unis selon laquelle ceux-ci «ont appuyé le processus de Contadora dès l'origine» (**II**, contre-mémoire, p. 170), on ne peut comprendre en quoi cet appui permettrait aux Etats-Unis de s'abriter derrière des négociations menées entre les Etats tiers, dans un forum auquel ils ne participent pas, et de contester, pour cette raison, la compétence de la Cour dans un litige qui les oppose au Nicaragua.

Parce que la résolution 530 du Conseil de sécurité appuie les efforts du groupe de Contadora et a été adoptée, le 19 mai 1983, à l'unanimité, faut-il en déduire que la Cour serait incompétente pour connaître d'un différend opposant l'un quelconque des membres du groupe de Contadora à l'un quelconque des membres du Conseil de sécurité? Faut-il admettre que telle serait également la situation de l'ensemble des Etats membres de l'Assemblée générale des Nations Unies au prétexte que celle-ci a adopté, par consensus, le 11 novembre 1983, la résolution 38/10 qui, elle aussi, constitue un encouragement pour les efforts du groupe de Contadora? De telles conséquences sont évidemment déraisonnables; de même qu'il est déraisonnable de prétendre que des négociations entre un Etat quelconque et un participant au processus de Contadora pourraient priver la Cour de sa compétence pour connaître d'un différend surgissant entre les Etats concernés.

A cet égard, il convient d'ailleurs d'ouvrir une parenthèse: le contre-mémoire américain fait allusion (**I**, p. 71) aux discussions menées depuis le mois de juin 1984 entre le Nicaragua et les Etats-Unis. Il faut souligner que la visite à Managua du secrétaire d'Etat américain M. Shultz a eu lieu le 1^er^ juin 1984, c'est-à-dire trois semaines après qu'est intervenue l'ordonnance de la Cour en indication de mesures conservatoires dans la présente affaire. Ce fait, dans lequel il ne faut certainement pas voir une simple coïncidence chronologique, suffit à montrer de manière tout à fait claire que règlement judiciaire et négociations diplomatiques, loin de s'exclure, se confortent et se fortifient mutuellement.

En tout état de cause, ces contacts diplomatiques n'ont pas fait des Etats-Unis une partie au processus de Contadora, processus dont on ne voit pas à quel titre il pourrait avoir une quelconque incidence procédurale dans le présent litige.

C'est donc uniquement dans le souci de ne laisser dans l'ombre aucun des arguments avancés par les Etats-Unis à l'encontre de la recevabilité de la requête, que je m'interrogerai sur l'exception tirée des négociations parallèles menées au sein du groupe de Contadora.

Je me suis attaché, dans la partie introductive de mon exposé, à montrer que le fait que le litige juridique soumis à la Cour se situât dans un contexte politique, économique et social plus vaste ne portait aucunement atteinte à la possibilité pour la Cour de se prononcer sur la requête. Il n'y a donc pas lieu de revenir ici sur les longs développements consacrés par le contre-mémoire à cet aspect de la question, quelles que soient par ailleurs les réserves qu'appelle, de la part de la République du Nicaragua, la présentation du processus de Contadora faite par les Etats-Unis.

En admettant, pour les seuls besoins de la démonstration, que l'existence du groupe de Contadora interfère avec la présente procédure et a un impact quelconque dans celle-ci, *quod non*, il reste à s'interroger sur deux problèmes soulevés par les Etats-Unis :

i) L'appui donné par les Etats de la région d'une part, et par la communauté internationale d'autre part, au processus de Contadora, fait-il obstacle à ce que la Cour exerce sa juridiction dans la présente affaire ?

ii) Certaines dispositions de traités en vigueur entre les Parties et, en particulier, la Charte des Nations Unies et celle de l'Organisation des Etats américains, peuvent-elles constituer un tel obstacle ?

i) *L'appui donné au processus de Contadora par la Communauté internationale ne fait pas obstacle à l'exercice par la Cour de sa juridiction*

Rappelant la rédaction très compréhensive de l'article 36, paragraphe 1, de son Statut reprise à une nuance près dans le Statut de la Cour actuelle, la Cour permanente a rappelé que le principe posé par cette disposition

> « ne saurait être tenu en échec que dans les cas exceptionnels où le différend que des Etats voudraient soumettre à la Cour rentrerait dans la compétence exclusive, réservée à un autre organe » (*Droits de minorités en Haute-Silésie (écoles minoritaires), arrêt n° 12, 1928, C.P.J.I. série A n° 15*, p. 23).

Dans l'affaire relative à l'*Interprétation du statut du territoire de Memel*, qui prévoyait à la fois un recours possible au Conseil de la Société des Nations et la saisine de la Cour, celle-ci a estimé que, en dépit de la rédaction ambiguë de l'article 17 de la convention relative au statut de Memel, l'examen préalable d'un différend relatif au statut de Memel par le Conseil ne s'imposait nullement. Ni le fait que la Cour permanente n'était pas un organe de la Société des Nations ni le fait que dans les affaires relatives aux écoles minoritaires et au statut de Memel la Cour avait été saisie sur le fondement du paragraphe 1 de l'article 36 de son Statut ne diminuent en rien la portée de la constatation très générale de la Cour selon laquelle :

> « S'il est possible de faire de la procédure devant le Conseil une condition préalable au recours à la Cour, il est cependant nécessaire que l'intention des parties contractantes d'en faire pareille condition soit clairement établie. » (*C.P.J.I. série A/B n° 47*, p. 248.)

Autrement dit, le parallélisme des compétences est la règle, la prééminence du mode de règlement politique sur le mode de règlement judiciaire est l'exception et doit être expressément prévue.

Or, en l'espèce, on ne saurait parler de parties contractantes à un traité puisque le processus de Contadora n'a été institué par aucun traité et puisque, de toute manière, ni les membres du groupe de Contadora eux-mêmes ni les organes des Nations Unies n'ont jamais considéré que ce processus présentait un caractère exclusif comme mécanisme approprié de règlement pacifique des litiges nés de la situation en Amérique centrale. On peut d'ailleurs remarquer au surplus que quand bien même ces organes et ces Etats auraient affirmé que le groupe de Contadora jouissait à cet égard d'une compétence exclusive, cette affirmation n'aurait pu constituer et ne constituerait pas une décision juridiquement obligatoire. Quoi qu'il en soit, ils ne l'ont pas fait, ce qui eût d'ailleurs été contraire au principe du libre choix des moyens de règlement pacifique des différends posé à l'article 33 de la Charte des Nations Unies.

Il est tout à fait significatif que ni le communiqué adopté le 9 janvier 1933 par les ministres des affaires étrangères de la Colombie, du Mexique, du Panama et du Venezuela, qui marque le point de départ du processus (mémoire du Nicaragua, annexe IV, production A), ni la déclaration de Cancún adoptée le 17 juillet 1984 par les présidents des quatre mêmes Etats (*ibid.*, production C), ni le document sur les objectifs auquel les gouvernements d'Amérique centrale ont donné leur accord le 9 septembre 1983 (*ibid.*, production D), aucun de ces documents donc ne fait la moindre allusion au caractère exclusif que devrait avoir le processus de Contadora en tant que forum pour le règlement pacifique des différends résultant de la situation en Amérique centrale.

Très explicitement, l'acte revisé sur la paix et la coopération en Amérique centrale établi en septembre 1984 par les quatre puissances médiatrices prévoit, dans le chapitre premier de sa première partie, que les Etats de la région s'engagent à résoudre leurs différends par des moyens pacifiques conformément aux principes fondamentaux du droit international énoncé par la Charte des Nations Unies et la charte de l'Organisation des Etats américains.

De plus, dans le préambule de ce texte, il est dit que les Etats parties réaffirment «leur volonté de résoudre leurs différends dans le cadre du processus de négociation sous les auspices du groupe de Contadora», mais le préambule ajoute «ceci sans préjudice du droit de recourir à d'autres forums internationaux compétents». Je vous ai donné de ce texte, que nous croyons important, une traduction française. Je suis tout à fait incapable d'en donner une lecture en espagnol, cette traduction figurera dans le procès-verbal de la séance et, au surplus, l'agent du Nicaragua se tient à la disposition de la Cour au cas où elle voudrait prendre connaissance dans son intégralité de ce document extrêmement récent :

> «reafirmando, sin perjuicio del derecho de recurrir a otros foros internacionales competentes, su voluntad de solucionar sus controversias en el marco del proceso auspiciado por el grupo de Contadora.
>
> * * *
>
> 2. B) Solucionarán sus controversias por medios pacificos en observancia de los principios fundamentales del derecho internacional, contenidas en la carta de la Organizacion de las Naciones Unidas y en la carta de la Organizacion de Estados Americanos.»

De même, la résolution adoptée le 18 novembre 1983 par l'Assemblée générale de l'Organisation des Etats américains réaffirme l'importance des principes et règles contenus dans la charte de l'Organisation et, en particulier, l'engagement de procéder par des moyens exclusivement pacifiques au règlement des différends mais, tout en affirmant son soutien aux efforts du groupe de Contadora, cette résolution ne les considère aucunement comme exclusifs d'autres modes de règlement (annexe 94 au contre-mémoire des Etats-Unis).

On peut ajouter que dans le document sur les objectifs du 9 septembre 1983, les signataires se déclarent décidés à assurer la stricte application des principes de droit international qu'ils énoncent et ils ajoutent que les Etats qui les violeront devront répondre de ces violations (I, mémoire du Nicaragua, annexe IV, production D). Or, ce sont précisément ces principes de droit international énoncés dans le document sur les objectifs dont la République du Nicaragua a demandé à la Cour de bien vouloir assurer le respect.

Il faut noter également que loin de protester contre la saisine des organes des Nations Unies, les Etats membres du groupe ont participé pleinement aux discussions et qu'ils ont même exprimé l'espoir que les discussions de ces organes conduiraient ceux-ci à agir dans un sens déterminé que les Etats du groupe de

Contadora précisaient ; le communiqué commun du 12 mai 1983 est particulièrement clair à cet égard (voir **I**, mémoire du Nicaragua, annexe IV, production B).

A plusieurs reprises, le contre-mémoire des Etats-Unis affirme :

> « the resolutions adopted by both the Security Council and the General Assembly expressly recognize the Contadora Process as the [and I stress on this point] appropriate means of addressing and resolving these issues » (**I**, p. 173 ; voir aussi, par exemple, p. 171).

Cela n'est exact qu'à une très importante nuance près : s'il est vrai que les résolutions 530 (1983) du Conseil de sécurité et 38/10 de l'Assemblée générale apportent leur soutien au processus de Contadora, elle n'érigent nullement ce processus en forum unique de règlement pacifique des différends relatifs à l'Amérique centrale.

Cela apparaît tout à fait clairement à la lecture de la résolution 38/10 de l'Assemblée générale par laquelle celle-ci :

> « 8. *Prie* le Secrétaire général de tenir le Conseil de sécurité régulièrement informé, conformément à la résolution 530 (1983) de cet organe, de l'évolution de la situation et de l'application de ladite résolution.
>
> 9. *Prie* le Secrétaire général de faire rapport à l'Assemblée générale lors de sa trente-neuvième session sur l'application de la présente résolution ;
>
> 10. *Décide* de maintenir à l'examen la situation en Amérique centrale, les menaces à la sécurité qui pourraient se faire jour dans la région et le progrès des initiatives de paix. »

On ne saurait, je crois, dire de manière plus claire que, pour important qu'il soit, le processus de Contadora n'est pas le forum unique au sein duquel le règlement pacifique des différends concernant la situation en Amérique centrale doit être recherché.

ii) *Les Chartes des Nations Unies et de l'Organisation des Etats américains n'imposent pas l'épuisement des négociations régionales préalables*

Il reste en effet à se demander si, comme l'affirment les Etats-Unis :

> « Nicaragua is required by the Charters of the United Nations and of the Organization of American States to seek regional solutions to problems concerning the maintenance of regional peace and security » (**II**, contre-mémoire, p. 174).

Il n'est sans doute pas utile d'abuser de votre temps, Monsieur le Président, Messieurs les juges, en reprenant trop longuement les arguments, si souvent échangés, sur la question de savoir si la Charte des Nations Unies fait de l'« épuisement des négociations régionales » un préalable indispensable à la saisine des organes des Nations Unies.

Pour contester le bien-fondé de ce postulat, fondement nécessaire de la thèse soutenue par les Etats-Unis, il n'est, je crois, nul besoin d'adhérer à l'idée de Kelsen, selon laquelle les articles 33 et 52, paragraphe 2, de la Charte des Nations Unies sont incompatibles (*The Law of the United Nations*, préc., p. 434). En réalité, il ne peut faire de doute que la consécration des accords régionaux par la Charte ne porte aucune atteinte aux droits reconnus aux Etats membres et au Conseil de sécurité par le chapitre VI et à l'Assemblée générale par l'article 11, ainsi d'ailleurs que l'indiquait formellement M. Ward Allen, qui était spécialiste des affaires des organisations internationales, et qui avait participé, au titre de la délégation américaine, au comité 4 de la Troisième Commission — comité qui examina le problème des accords régionaux, à la Conférence de San Francisco —, et qui a publié un article en 1946 dans le *Department of State Bulletin* (« Organizing the United Nations », *a Series of Articles from the* Department of State Bulletin, *US-UN Information Series 6*, 1946, p. 9).

Il est tout à fait exact que les articles 20 et 21 de la charte de l'Organisation des Etats américains imposent aux Etats membres de soumettre leurs différends internationaux « aux procédures pacifiques indiquées dans cette charte avant de les porter à la connaissance du Conseil de sécurité de l'Organisation des Nations Unies ». Mais, d'une part, « la procédure judiciaire » constitue, précisément, l'une des « procédures pacifiques » énumérées dans l'article 21, votre haute juridiction est chargée par excellence de mettre en œuvre une procédure judiciaire, or l'article 21 de la charte de l'Organisation des Etats américains ne vise que le Conseil de sécurité. D'autre part, comme l'a écrit M. Jiménez de Aréchaga :

> « l'article 20 de la charte de l'Organisation des Etats américains ou des dispositions semblables n'équivalent pas à transformer l'organisation régionale en une instance préalable à celle des Nations Unies » (« La coordination des systèmes de l'ONU et de l'OEA pour le règlement pacifique des différends et la sécurité collective », *RCADI*, 1964, t. 111, p. 431).

C'est que, en tout en état de cause, la charte de l'Organisation des Etats américains doit être lue et interprétée à la lumière de celle des Nations Unies, conformément au principe de la prééminence de celle-ci, posé par son article 103 et confirmé par l'article 102 de la charte de Bogotá. Nous devons lire la Charte des Nations Unies avant de lire la charte de Bogotá.

Or, s'agissant de la Charte des Nations Unies, le paragraphe 2 de l'article 52 impose aux Etats qui concluent des accords ou constituent des organismes régionaux de « faire tous leurs efforts pour régler d'une manière pacifique, par le moyen desdits accords ou organismes, les différends d'ordre local, avant de les soumettre au Conseil de sécurité ». Cette disposition doit être lue en fonction du paragraphe 4 du même article, paragraphe 4 que le contre-mémoire des Etats-Unis (I) ne cite pas, alors qu'il reproduit, pages 189 et 190, dans leur intégralité, les autres paragraphes de l'article 52 ; on peut s'interroger sur le bien-fondé d'une telle pratique. Ce paragraphe 4, que les Etats-Unis omettent de citer, préserve expressément les compétences que le Conseil de sécurité et l'Assemblée générale tiennent des articles 34 et 35 de la Charte. C'est le seul paragraphe sans doute qui, dans cet article 52, gênait les Etats-Unis ?

De plus, il résulte de l'article 35 de la Charte que tout Etat, membre ou non membre de l'Organisation des Nations Unies, « peut attirer l'attention du Conseil de sécurité ou de l'Assemblée générale » sur un différend ou une situation dont la prolongation « semble devoir menacer le maintien de la paix et de la sécurité internationales », comme cela est précisé à l'article 34.

Comme l'a écrit, dès 1961, M. Ruda :

> « Si tout membre de l'ONU, c'est-à-dire même ceux qui ne sont pas membres de l'OEA, peut porter un différend au Conseil, même s'il n'est pas partie au différend, il n'est pas concevable qu'un membre de l'OEA possède moins de droits, et il l'est moins encore qu'il ne puisse exercer ceux qui lui appartiennent en tant que membre de l'ONU » (« *Si cualquier Miembro de la UN es decir aun aquellos que no lo son de la OEA, puede llevar una controversia al Consejo, inclusivo no siendo parte en ella, no es concebible que un Miembro de la OEA posea menos derechos y, mas aun, no pueda ejercer las que le corresponden como Miembro de la UN* » ; (« Relaciones de

> la OEA y la ONU en cuanto al mantenimiento de la paz y la seguridad internacionales», *Revista Juridica de Buenos Aires*, 1961, p. 39.)

Le raisonnement est en tous points transposable à l'hypothèse d'un arrangement régional informel comme celui qui a donné naissance au processus de Contadora.

Cela conduit inévitablement à admettre que les procédures régionales de règlement pacifique des différends ne sont pas exclusives de l'utilisation des mécanismes des Nations Unies et ne bénéficient d'aucun privilège d'antériorité et moins encore d'aucun privilège de supériorité.

Le raisonnement que je viens d'esquisser est conforté par la pratique des organes des Nations Unies et, particulièrement, par celle du Conseil de sécurité.

Pour s'en tenir aux affaires qui ont concerné des Etats d'Amérique latine, le Conseil de sécurité n'a refusé d'examiner par exemple ni la plainte du Guatemala en 1954, ni plusieurs plaintes de Cuba au début des années soixante, ni les problèmes posés par la guerre civile en République dominicaine en 1965, ni, plus récemment, la situation créée à la Grenade par les Etats-Unis en octobre 1983. De même aussi, le Conseil de sécurité a examiné, à trois reprises durant la seule année 1983 — en mars, en mai, et en septembre — les plaintes du Nicaragua au sujet des atteintes à sa souveraineté perpétrées par les Etats-Unis ou avec leur aide. De nombreux pays membres de l'Organisation des Etats américains et tous ceux du groupe de Contadora ont participé aux débats du Conseil de sécurité sans à aucun moment, semble-t-il, formuler d'objection de nature juridique à l'encontre de la saisine du Conseil. De même, s'agissant cette fois de l'Assemblée générale, la situation en Amérique centrale a été inscrite à l'ordre du jour des trente-huitième et trente-neuvième sessions de l'Assemblée générale dont elle constituait respectivement les points 142 et 25.

Ainsi, comme l'a démontré avec beaucoup de science et d'autorité M. Jiménez de Aréchaga, dans le cours qu'il a donné en 1964 à l'Académie de droit international :

> «Etant donné les règles applicables et les précédents établis, il faut conclure que, quoique les Etats américains doivent faire des efforts bona fide pour parvenir à un règlement pacifique des différends d'ordre local par les moyens régionaux, cela n'empêche pas ces Etats d'avoir directement accès aux organes des Nations Unies quand la partie au différend juge que les méthodes régionales ne sont ou ne peuvent pas être efficaces pour régler le cas en question. L'appel direct aux organes des Nations Unies étant valable, il doit être reçu et l'affaire inscrite à l'ordre du jour, la liberté de ces organes (c'est-à-dire la liberté de statuer ou de renvoyer) demeurant entière.» (*RCADI*, 1964, t. 111, préc., p. 440.)

En résumé sur ce point, il apparaît que l'existence du processus de Contadora ne fait aucunement obstacle à l'examen de la requête par la Cour. Considéré comme un mécanisme particulièrement utile tant par les Etats de la région que par l'Organisation des Etats américains, l'Assemblée générale et le Conseil de sécurité, le groupe de Contadora ne s'est jamais vu reconnaître de compétence exclusive pour le règlement des différends concernant la situation en Amérique centrale, et cette exclusivité ne résulte pas non plus de la Charte des Nations Unies et pas non plus de la charte de l'Organisation des Etats américains.

De plus et surtout, les Etats-Unis ne prenant décidément pas part aux négociations de Contadora, ce processus ne saurait constituer en tout état de cause le cadre approprié — ni d'ailleurs le cadre possible — pour le règlement du différend opposant ce pays au Nicaragua. Comment, du reste, le groupe de Contadora pourrait-il décider que les Etats-Unis — qui n'en font pas partie —

ont violé à l'égard du Nicaragua un grand nombre de principes fondamentaux du droit des gens ? Ce que demande la requête. Comment ce groupe pourrait-il enjoindre aux Etats-Unis de mettre fin à ces violations ? Ce que demande la requête. Comment ce groupe pourrait-il fixer le montant de la réparation qui est due au Nicaragua ? Ce que demande aussi la requête. Ce sont ces demandes, et elles seules, que par sa requête la République du Nicaragua a prié la Cour de bien vouloir examiner.

En en ayant terminé avec le problème posé par les négociations au sein du processus de Contadora, j'en viens au problème de la compétence parallèle des organes politiques des Nations Unies.

b) *La compétence parallèle des organes politiques des Nations Unies*

Les Etats-Unis s'enferment du reste dans une contradiction à peu près insoluble. Dans le chapitre V de la quatrième partie de leur contre-mémoire, ils affirment que seules des négociations régionales, auxquelles ils ne participent pas, peuvent résoudre le différend et ceci n'empêche pas les Etats-Unis de soutenir dans les chapitres II et III de la même partie que les organes politiques des Nations Unies ont une compétence exclusive dans le domaine faisant l'objet du présent litige. Ou bien ils détruisent leur premier argument avec le second, ou bien ils détruisent le second avec le premier ; on voit mal comment ils peuvent concilier l'un et l'autre. Quoi qu'il en soit, s'agissant de la compétence exclusive qui, selon eux, appartiendrait aux organes politiques des Nations Unies, l'argumentation américaine peut être décomposée sur ce point en trois éléments principaux. En se prononçant sur la requête, la Cour :

i) premièrement, se substituerait purement et simplement aux compétences des organes politiques des Nations Unies ;
ii) en second lieu, et plus précisément, la Cour empiéterait sur les prérogatives exclusives du Conseil de sécurité en cas de menace contre la paix, de rupture de la paix ou d'acte d'agression, et,
iii) en troisième lieu, la Cour, en se prononçant, ferait obstacle à l'exercice par les Etats concernés de leur droit de légitime défense.

J'examinerai le premier de ces arguments avant de vous demander, Monsieur le Président, de bien vouloir donner de nouveau la parole à M. Chayes, qui présentera de brèves observations sur les deux autres points avant les conclusions finales de l'agent du Nicaragua.

Investi par l'article 24, paragraphe 1, de la Charte des Nations Unies de la « responsabilité principale du maintien de la paix et de la sécurité internationales », le Conseil de sécurité n'a pas le monopole de cette responsabilité, comme l'a du reste nettement souligné la Cour dans son avis consultatif relatif à *Certaines dépenses des Nations Unies* (*C.I.J. Recueil 1962*, p. 163). Les Etats-Unis semblent en convenir mais ils estiment que la responsabilité du Conseil de sécurité n'est concurrencée que par les compétences limitées appartenant à l'Assemblée générale en vertu des articles 10 et 11 de la Charte, d'une part, et par celles appartenant aux organismes et accords régionaux visées au chapitre VIII, d'autre part (I, contre-mémoire, p. 188 et suiv.). Quant à la Cour, selon les Etats-Unis, elle ne saurait avoir aucune responsabilité dans ce domaine.

Il est pour le moins surprenant d'arriver à cette conclusion en se fondant, en particulier, sur le texte de l'article 92 de la Charte (I, contre-mémoire, p. 209). Instituant la Cour en tant qu'organe judiciaire principal des Nations Unies, cette disposition impose à la Cour de contribuer pleinement à la réalisation des buts de l'Organisation et il faudrait des raisons bien décisives pour prétendre qu'elle n'est pas concernée par la défense du premier de ces buts, fixé par l'article premier, paragraphe 1, de la Charte, et qui est précisément, le maintien de la paix et de la sécurité internationales.

La longue citation extraite de l'ouvrage de M. Rosenne (*The Law and Practice of the International Court*, préc., p. 69-70), qui est placée en exergue du chapitre III de la quatrième partie du contre-mémoire des Etats-Unis (**I**) (p. 209-210), ne dit d'ailleurs pas autre chose ; et on peut la compléter par cet autre extrait du même livre :

> « The definition of the Status of the Court as a principal organ, and the principal judicial organ, of what is essentially a political organisation, the United Nations, emphasizes that international adjudication is a function which is performed within the general framework of the political organisation of the international society, and that the Court has a task that is directly related to the pacific settlement of international disputes and hence to the maintenance of international peace. » (S. Rosenne, *op. cit.*, p. 2.)

Contrairement à ce qu'écrivent les Etats-Unis, c'est, justement, parce que elle est l'organe judiciaire principal des Nations Unies que la Cour doit tenir compte du « système général de la Charte et du Statut », comme le disaient un certain nombre de juges dans leur opinion individuelle commune en l'affaire du *Détroit de Corfou, exception préliminaire* (*C.I.J. Recueil 1948*, p. 32). C'est justement donc parce qu'elle doit tenir compte du système général de la Charte et du Statut que la Cour peut et doit contribuer au maintien de la paix et de la sécurité internationales.

Placée sur un pied d'égalité avec les autres organes principaux de l'Organisation, la Cour n'en est pas moins investie d'une mission spécifique.

Comme l'a rappelé la Cour dans son avis consultatif relatif à la *Réparation des dommages subis au service des Nations Unies*, l'Organisation des Nations Unies dans son ensemble est un corps politique, chargé d'accomplir des missions politiques (*C.I.J. Recueil 1949*, p. 179). Mais, dans cet ensemble, la Cour internationale de Justice se singularise à plusieurs points de vue et surtout du fait que : i) elle est investie d'un pouvoir de décision obligatoire très étendu que ne possèdent pas les autres organes y compris le Conseil de sécurité, et ii) que ses décisions sont prises sur le fondement exclusif des règles de droit.

La Cour est dès lors appelée à jouer, dans le cadre général de l'Organisation, un rôle tout à fait particulier qui se caractérise non pas par l'objet de ses interventions mais par sa manière de traiter et d'appréhender les problèmes qui lui sont soumis. Comme l'avait écrit le Secrétaire général des Nations Unies, M. Dag Hammarkschöld, dans l'introduction à son *Rapport annuel sur l'activité de l'Organisation* (16 juin 1958-15 juin 1959) :

> « Il faut reconnaître que bien des différends internationaux posent des questions juridiques en même temps que politiques, et que la soumission de ces questions à la Cour pour règlement judiciaire préparerait le terrain à des négociations pacifiques au sein des organes politiques de l'ONU.
>
> Négliger les éléments juridiques des différends internationaux et les moyens de les éclaircir, c'est faire obstacle au progrès dans le domaine politique, ce qui risque, à la longue, d'affaiblir l'autorité du droit dans les affaires internationales. » (Doc. A/4132/Add.1.)

C'est cette spécificité marquée de ses fonctions judiciaires qui a permis à la Cour d'affirmer que, même si les questions qui lui sont soumises sont identiques dans certains cas à celles dont les organes politiques ont à connaître, il s'agit toujours de « deux litiges distincts » (affaire du *Sud-Ouest africain, C.I.J. Recueil 1962*, p. 345).

Et c'est aussi la raison pour laquelle la Charte, qui se préoccupe d'éviter la litispendance dans les relations entre le Conseil de sécurité, d'une part, l'Assemblée générale et les organismes régionaux, d'autre part, ne contient aucune disposition qui soit comparable aux articles 12 ou 52 et 53 en ce qui concerne les relations entre la Cour et les organes politiques des Nations Unies. On cherche à éviter la litispendance vis-à-vis d'organes politiques. On a jugé inutile d'éviter la litispendance dès lors qu'un organe politique, d'une part, et un organe judiciaire, d'autre part, sont appelés à se prononcer. Dans le premier cas, il a été nécessaire d'éviter que le Conseil de sécurité, l'Assemblée générale ou les organismes régionaux se prononcent en même temps sur les mêmes litiges car ils exercent à l'égard de ces litiges des fonctions comparables. Dans le second cas, celui des relations entre la Cour et les organes politiques, cette précaution n'a pas semblé utile car la Cour et les organes politiques se situent sur des terrains différents.

A vrai dire, conformément à la pratique de la Société des Nations dont les organes politiques ont plusieurs fois sursis à statuer sur une affaire dont un tribunal arbitral était saisi, des propositions ont parfois été faites pour éviter que le Conseil de sécurité se prononce sur un différend soumis à la Cour. Tel était le sens d'un projet d'amendement de la Turquie au paragraphe 5 de ce qui constituait alors la section A du chapitre VIII des *Propositions de Dumbarton Oaks* (doc. 207, III/2/a/3, *UNCIO*, p. 186), projet d'amendement que mentionne, sous une forme un peu différente, le contre-mémoire des Etats-Unis (**I**) (p. 198). Après la création des Nations Unies, il est également arrivé que certains Etats Membres expriment des doutes sur l'opportunité, pour un organe politique, de se prononcer sur une affaire dont la Cour était saisie. Tel fut le cas, par exemple, du représentant de l'Inde au Conseil de sécurité lors de l'examen de l'affaire de l'*Anglo-Iranian* (561^e séance, 1951, p. 17). Ces suggestions n'ont jamais été retenues et ceci traduit bien, me semble-t-il, la conviction des Etats selon laquelle un organe judiciaire, d'une part, des organes politiques, d'autre part, évoluent sur des terrains différents.

Il est en effet arrivé, à maintes reprises, que le Conseil de sécurité ou l'Assemblée générale se prononcent sur une affaire qui se trouvait *sub judice*. Tel a été le cas, par exemple, de l'Assemblée générale, lorsque la Cour examinait l'affaire du *Sud-Ouest africain* ou les questions qui lui avaient été posées par l'Assemblée générale elle-même au sujet des *Réserves à la Convention pour la prévention et la répression du crime de génocide*. De même, le Conseil de sécurité, pour sa part, a adopté des résolutions sur l'affaire de l'*Anglo-Iranian* ou du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, alors même que ces affaires étaient pendantes devant la Cour.

A l'inverse, la jurisprudence ne consacre, en aucune manière, la règle contraire qu'invoquent les Etats-Unis et, selon laquelle, la Cour serait empêchée de statuer si un problème relevant également de la compétence d'un autre organe est en cours d'examen ou a été examiné par celui-ci ; tout au plus, dans cette dernière hypothèse, c'est-à-dire si l'autre organe s'est prononcé, la Cour devrait-elle tenir compte pleinement de la décision prise par l'organe politique, si du moins cet organe est investi d'un pouvoir de décision.

C'est ce qui ressort, par exemple, de l'arrêt rendu par la Cour dans l'affaire du *Cameroun septentrional*. D'une part, en effet, la haute juridiction a considéré qu'elle n'avait « plus compétence par suite de la cessation de la tutelle par l'effet de la résolution 1608 (XV) de l'Assemblée générale » (*C.I.J. Recueil 1963*, p. 35) ; mais, d'autre part, la Cour dans cette affaire, a indiqué, en termes très clairs :

> « La Cour n'a pas à se préoccuper de savoir si un différend portant sur le même objet a existé ou non entre la République du Cameroun et les Nations Unies ou l'Assemblée générale. » (*Ibid.*, p. 27.)

Cela a été confirmé de manière tout à fait éclatante par la Cour dans son arrêt du 24 mai 1980 relatif au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran* :

> « Il ne fait aucun doute que le Conseil de sécurité était « activement saisi de la question » et qu'il avait donné expressément mandat au Secrétaire général de prêter ses bons offices lorsque, le 15 décembre 1969, la Cour a considéré à l'unanimité qu'elle avait compétence pour connaître de la demande en indication de mesures conservatoires des Etats-Unis et a indiqué de telles mesures. »

Puis, le Conseil de sécurité s'est réuni de nouveau le 31 décembre 1979 et a adopté la nouvelle résolution 461 (1979) :

> « Dans le préambule de cette seconde résolution, le Conseil de sécurité tenait expressément compte de l'ordonnance de la Cour en indication de mesures conservatoires du 15 décembre 1979 ; il ne semble être venu à l'esprit d'aucun membre du Conseil qu'il y eût ou pût y avoir rien d'irrégulier dans l'exercice simultané par la Cour et par le Conseil de sécurité de leurs fonctions respectives. Le fait n'est d'ailleurs pas surprenant. Alors que l'article 12 de la Charte interdit expressément à l'Assemblée générale de faire une recommandation au sujet d'un différend ou d'une situation à l'égard desquels le Conseil remplit ses fonctions, ni la Charte ni le Statut n'apportent de restrictions semblables à l'exercice des fonctions de la Cour. Les raisons en sont évidentes : c'est à la Cour, organe judiciaire principal des Nations Unies, qu'il appartient de résoudre toute question juridique pouvant opposer des parties à un différend ; et la résolution de ces questions juridiques par la Cour peut jouer un rôle important et parfois déterminant dans le règlement pacifique du différend. C'est d'ailleurs ce que reconnaît l'article 36, paragraphe 3, de la Charte... » (*C.I.J. Recueil 1980*, p. 21-22.)

Cette longue citation, que je me suis permis de faire, établit de manière particulièrement claire que l'examen d'une affaire par le Conseil de sécurité n'interdit en aucune manière à la Cour de se prononcer.

S'il en va ainsi lorsque les organes politiques compétents de l'Organisation ont adopté une décision ou une recommandation et la jurisprudence que je viens de citer l'établit sans aucune espèce de discussion possible, et se sont prononcés effectivement, tel est à fortiori le cas lorsqu'ils n'adoptent aucune résolution. Le rejet d'un projet de résolution par l'Assemblée générale ou par le Conseil de sécurité ne signifie rien d'autre que la non-adoption par l'organe concerné du texte précis sur lequel il a été appelé à voter, au moment où il s'est prononcé : le même organe peut d'ailleurs parfaitement adopter un texte très voisin peu après, voire même le jour où il a rejeté le premier texte, voire même reprendre quelque temps plus tard le texte rejeté, etc.

On ne saurait donc admettre, comme le font les Etats-Unis, qu'en tranchant le présent litige la Cour « reviserait des décisions déjà prises par les organes politiques » comme ils l'affirment à la page 218 du contre-mémoire (I), sous prétexte que, lors de sa 2529^e séance, le 4 avril 1984, le Conseil de sécurité n'a pas pu adopter le projet de résolution présenté par le Nicaragua, du fait d'ailleurs de l'opposition des Etats-Unis (I, mémoire, annexe III, production D). Se fondant sur des raisons différentes, qui sont des raisons exclusivement juridiques, la présente requête demande à la Cour de rendre un arrêt, un acte juridique de nature totalement différente de celle des résolutions du Conseil de sécurité.

Au surplus, on ne saurait assimiler une non-décision à une décision. La vérité est que le Conseil de sécurité, le 4 avril 1984, n'a pas pris de décision et ce n'est que par un raisonnement passablement tortueux que les Etats-Unis transforment une non-décision en une décision. Quoi qu'il en soit, la jurisprudence de la Cour fournit des exemples d'arrêts qui ont été rendus après qu'un projet de résolution concernant l'affaire en cause eut été rejeté par le Conseil de sécurité du fait du vote négatif de l'un de ses membres. Ainsi, dans l'affaire du *Détroit de Corfou*, un projet de résolution présenté par le Royaume-Uni n'a pu être adopté lors de la 122e séance du Conseil de sécurité du fait du vote hostile de l'un des membres permanents (Nations Unies *Procès-verbaux officiels du Conseil de sécurité, 120e et 122e séances*, p. 567 et 609) ; deux mois plus tard, après la non-adoption du projet, le Royaume-Uni a saisi la Cour d'une requête rédigée dans des termes tout à fait voisins de ceux qu'employait le projet de résolution qu'il avait soumis quelque temps auparavant au Conseil de sécurité, et cette requête a été jugée recevable par la Cour dans son arrêt du 25 mars 1948. De même, dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, le vote hostile d'un membre permanent du Conseil de sécurité sur un projet de résolution concernant cette affaire n'a aucunement empêché la Cour de se prononcer au fond (*C.I.J. Recueil 1980*, p. 17, par. 31). Il n'y avait pas eu de décision ; il y avait eu si l'on veut une non-décision. La Cour ne s'en est pas moins prononcée.

On peut ajouter que par leur attitude constante les Etats montrent qu'ils ont clairement conscience que l'examen d'un différend par le Conseil de sécurité ne fait pas obstacle à la saisine de la Cour.

Tel est en particulier l'attitude des Etats-Unis justement qui, par exemple, durant l'examen de la situation créée par le blocus de Berlin par le Conseil de sécurité — et c'était quand même une situation qui concernait la paix et la sécurité internationales !... — ont déclaré, par la voie de l'ambassadeur Philip Jessup, qu'ils envisageaient de soumettre l'affaire à la Cour internationale de Justice (Nations Unies, *Procès-verbaux officiels du Conseil de sécurité*, séance du 6 octobre 1948, p. 8). De même, lors de la 679e séance du Conseil de sécurité le 10 septembre 1954, le représentant des Etats-Unis a déclaré que son gouvernement estimait que la procédure juridique devant la Cour était celle qui convenait le mieux à l'examen du différend en cause — il s'agissait d'un aéronef américain abattu par la chasse soviétique.

Ainsi, les Etats — et singulièrement les Etats-Unis d'Amérique — manifestent constamment leur conviction que la procédure politique devant le Conseil de sécurité et la procédure judiciaire devant la Cour, loin d'être exclusives l'une de l'autre, se complètent et peuvent être menées simultanément ou successivement — ce dont témoigne également la rédaction de l'article 36, paragraphe 4, de la Charte des Nations Unies.

Faute de cette conviction, d'ailleurs, on s'expliquerait mal les réserves que certains Etats ont mises à leur déclaration d'acceptation de la juridiction obligatoire de la Cour et dont l'objet est d'éviter que le Conseil de sécurité d'une part et votre haute juridiction d'autre part puissent être saisis simultanément d'un même différend. Cette pratique trouve son origine dans la première déclaration faite par le Royaume-Uni, en 1929, qui avait indiqué que l'examen d'un litige par la Cour permanente devrait être suspendu durant une année s'il venait à être soumis au Conseil de sécurité de la Société des Nations. De nombreux Etats, durant l'entre-deux-guerres, ont assorti leur déclaration d'une réserve identique et une telle réserve a de nouveau été incluse dans la déclaration par exemple de l'Australie, qui est restée en vigueur de 1954 à 1975, et qui par conséquent concernait bien la Cour actuelle, organe judiciaire principal des Nations Unies.

Ainsi, et j'en ai pratiquement terminé, Monsieur le Président, comme l'écrit M. Rosenne :

> «It may be noted that while the Court's task is limited to functions of a legal character its power of action and decision is subject to no limitation deriving from the fact that the dispute before it might also be within the competence of some other organ [ou, ajoute M. l'ambassadeur Rosenne, en note : «even in the agenda of another organ»]. If the maintenance of international peace and security can be regarded as a major function of the United Nations as a whole (including the Court), the Charter confers no exclusive competence upon any one principal organ. Even the fact that the Security Council has primary responsibility for the maintenance of international peace and security under Article 24 of the Charter is not sufficient to give it exclusive competence over these matters. Only in relation to the General Assembly do Articles 11 and 12 of the Charter contain some limitation upon that organ's power of action (though not of discussion) when the Security Council is seised of a particular dispute or situation»,

cela de nouveau dans son livre *Law and Practice of the International Court* (p. 73), qui décidément aura été à l'honneur durant nos débats.

Cette conclusion, Monsieur le Président, me semble se suffire à elle-même. La Cour peut se prononcer sur un différend qui est examiné par d'autres organes politiques des Nations Unies car elle exerce des fonctions différentes. En aucune manière le fait pour la Cour de se prononcer sur la présente affaire ne serait contraire à l'exercice des fonctions judiciaires qui sont les siennes, le contraire le serait en privant les Parties d'un prononcé judiciaire sur des problèmes juridiques qui les opposent.

Monsieur le Président, Messieurs les juges, je vous remercie très vivement de la bienveillante attention avec laquelle vous avez bien voulu m'écouter et je vous demande, Monsieur le Président, de bien vouloir donner la parole à M. Chayes pour une ultime et brève intervention qui précédera la dernière intervention de M. l'agent du Nicaragua.

L'audience, suspendue à 11 h 30, est reprise à 11 h 45

ARGUMENT OF PROFESSOR CHAYES

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Mr. President, Members of the Court. May it please the Court.

THE POWERS OF THE SECURITY COUNCIL UNDER ARTICLE 39

My colleague, Professor Pellet, has addressed the question of the relative roles of political and judicial settlement in the light of the applicable general principles and practice. As he has shown, these principles do not require that one kind of organ should withdraw or give way to the other. Their tasks, methods and actions are different and each can properly address aspects within its competence of situations in which the other is or might become engaged.

But the United States makes a further assertion. It argues that the Court is precluded by positive law of the United Nations Charter from entertaining one particular kind of case: a case charging use of armed force in violation of Article 2 (4), in circumstances that might be characterized as a threat to the peace, breach of the peace or act of aggression.

The United States says, in the end, that the Court must stay its hand in this case because the legal issues raised by Nicaragua's Application are committed to the exclusive competence of the Security Council by Articles 39 and 51 of the United Nations Charter. (**II**, Counter-Memorial, paras. 444-492.)

Before we deal with this contention in detail, it is well to be clear about what it would entail if accepted.

It means that no matter how brutal or violent or unjustified a violation of Article 2 (4) of the Charter is presented to the Court in a case otherwise within its jurisdiction, the Court would be powerless to intervene to protect the victim.

It means that the United States would have unbridled licence to use force in violation of Article 2 (4), in its sole and unreviewable discretion, whenever and for whatever purpose it chose to do so; and it would then be protected by its veto in the Security Council.

It means that the same licence would be available to any permanent member of the Security Council or any of its allies or clients, on whose behalf it might exercise its veto.

That is not the world of peace under law that the framers of the United Nations sought to build.

It is a world of force and violence perpetrated by the strong against the weak that the framers hoped to bring to an end.

And it is not the law.

This Court, early in its history, had occasion to pass on the kind of theory the United States is now advancing. In the *Corfu Channel* case it said:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." (*I.C.J. Reports 1949*, p. 35.)

The course of events in the intervening years provides no basis for a retreat from that pronouncement.

Let us turn now to a more detailed examination of the United States argument. Article 39 provides: "The Security Council shall determine the existence of a threat to the peace, breach of the peace or act of aggression . . ."

The United States recognizes that the Nicaraguan Memorial does not use the words "aggression" or "threat to the peace" or "breach of the peace". There is no mystery about that, no attempt, as the United States charges, to "mask" something (**II**, Counter-Memorial, para. 447). Nicaragua asserts in the first paragraph of its Application that: "The United States of America is using military force against Nicaragua . . . in violation of [its] . . . territorial integrity and political independence . . ." (**I**, Application, para. 1.)

The United States professes to find the source of this language in the resolution on the Definition of Aggression adopted by the General Assembly in 1974 (**II**, Counter-Memorial, para. 445). Surely there was no need to travel so far afield. The Application, in this respect, rests squarely on Article 2 (4) of the United Nations Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State". Nicaragua's Application in this aspect is, properly and deliberately, cast in the terms of Article 2 (4), and of the comparable articles of the Organization of American States Charter.

For all its pages of argument and burden of erudition, the United States Counter-Memorial fails to grasp or perhaps evades this fundamental distinction:

Article 2 (4) defines a legal obligation.
Article 39 establishes a political process.

Both are of supreme importance to the structure of the Charter. But that structure would be severely compromised by ignoring the difference between the two Articles or collapsing the one into the other.

Much of the United States argument on this branch of the case is devoted to showing that the Charter envisions a major role for the Security Council in organizing and developing political solutions to problems of international peace and security. There can be no quarrel with this extended excursion into the history and origins of the Charter except that it belabours the obvious (**II**, Counter-Memorial, paras. 460-478).

As we know, Article 24 confers upon the Security Council "primary responsibility for maintenance of international peace and security . . .". And the Charter abounds with provisions, chiefly in Chapters VI, VII and VIII, empowering the Council to carry out this responsibility.

As we also know, the responsibility of the Council is "primary" not exclusive. Each of the organs of the United Nations is to participate, according to its own powers and procedures, in the effort "to maintain international peace and security", which is after all the first purpose of the Organization. (United Nations Charter, Art. 1 (1).)

Only two priorities among the organs are expressed in the Charter. The first is in Article 12 (1), which disables the General Assembly from making recommendations with respect to a dispute or situation "[w]hile the Security Council is exercising in respect of [that] dispute or situation the functions assigned to it in the present Charter . . .". The second is in Article 11 (2): "Any such question [relating to the maintenance of international peace and security] on which action is necessary shall be referred to the Security Council . . ." The Court has already remarked that the Charter expresses no similar priority with regard to the principal judicial organ of the Organization (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 21).

What then is the significance of the provision of Article 39 that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .". Surely what is called for is not an exercise in taxonomy, the act of attaching a label to a situation. Still less does it contemplate a legal analysis or the authoritative decision of a legal issue.

The meaning and function of these words is revealed by their position at the beginning of Chapter VII of the Charter. Chapter VII concerns "*Action* with Respect to Threats to the Peace, Breaches of the Peace, or Acts of Aggression". And the subsequent words of Article 39 authorize the Council, after making the determination, to "*decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and security" (emphasis added).

Here is the key to the meaning and function of a determination under Article 39. It is necessary as a predicate to bring into play the extraordinary powers of the Security Council under Article 41 and Article 42 of the Charter. As the Court understands, those Articles empower the Council to decide to impose economic sanctions or to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Art. 42). And, "decisions" under Article 41 or 42 are given binding effect on the Members of the United Nations by virtue of Article 25.

This was the great departure made in the Charter over all previous international organizations and particularly the League of Nations. For the first time, an organ of an international organization is empowered to take decisions on economic and military sanctions for the maintenance of international peace and security with binding force on all Members, and without their individual consents.

It is clear that this was thought of as an extraordinary power, to be used only in cases of great urgency. Indeed, I believe it has been invoked no more than three times in the four decades of the United Nations Organization. Thus Article 39 requires a solemn determination by the Council that the situation is one calling for the exercise of these extraordinary powers.

To be sure, such a determination will not ignore the legal situation and the legal claims of the parties to the dispute or situation before the Council. Legal argumentation, indeed, commonly plays a large role in the debates of the Council on such occasions. But it will not be decisive. There is no suggestion that every use of armed force in violation of Article 2 (4) calls for a determination of the Council under Article 39 or action under Chapter VII. On the contrary, the framers were at pains to avoid any such suggestion — any hint of "automaticity" in bringing the Chapter VII powers of the Council into play. That is why, as set forth at such great length in the Counter-Memorial, they resisted all efforts to define aggression or to set up rules that would automatically call for action by the Council under Chapter VII, and why all subsequent efforts to do so have failed (**II**, Counter-Memorial, paras. 471-473, 477, 485-492).

The power to take mandatory action binding on the Members is reserved for those rare occasions when the Security Council in the exercise of a political, not legal, judgment determines that the situation requires it. Until the Council makes a determination under Article 39, the situation falls to be dealt with not under Chapter VII — concerning "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression" — but under Chapter VI, on "Pacific Settlement of Disputes". Until the Security Council determines otherwise under Article 39, the situation, no matter how grave or inflamed, is, for the purposes of the Charter a "dispute the continuance of which is likely to endanger the maintenance of international peace and security" under Article 33. It remains to be dealt with by the methods of peaceful settlement provided in that Article, including judicial settlement.

Even after an Article 39 determination, as my colleague Mr. Pellet has shown, there is no necessary inconsistency between Security Council action and adjudication by the Court. The only power exclusively committed to the Security Council is the power to take "action" within the meaning of Chapter VII, that is, to prescribe mandatory economic and military sanctions under Articles 41 and 42 (*Certain Expenses of the United Nations, I.C.J. Reports 1962*, pp. 165, 177). And as we have already noted, although Article 11 (2) requires the General Assembly to defer to the Security Council when "action is necessary", the Charter contains no such provisions staying the procedures of the Court.

This is the way the Council itself has dealt with Article 39 from the earliest years of the United Nations. As an illustration, let me review briefly one case, one of the many instances in which Article 39 action was proposed and one of the few in which it was actually taken. I am speaking of the response of the Security Council to the purported "Unilateral Declaration of Independence" of the Smith régime in Rhodesia in November 1965. Immediately after the UDI, as it was called, the African States put forward a draft resolution in the Security Council that provided in its first operative paragraph:

> "*The Security Council,*
>
> . . .
>
> 1. *Determines* that the situation resulting from this declaration of independence constitutes a threat to international peace and security."

That is the canonical language, "a threat to international peace and security". And then in paragraph 9:

> "9. *Decides* to take all the enforcement measures provided for under Articles 42 and 43 of the Charter against the racist minority settler régime." (20 *UNSCOR*, 1259th meeting, pp. 20-21, UN doc. S/6929, 1965.)

Great Britain and other countries opposed the African resolution on the ground that the situation could be resolved without resort to force and therefore did not warrant the invocation of Chapter VII (*ibid.*, 1257th meeting, pp. 3-8, 1965). Ultimately the African draft resolution was withdrawn in favour of a negotiated text. The critical paragraph of that text:

> "*Determines* that the situation . . . is extremely grave . . . and that its continuance in time constitutes a threat to international peace and security." (SC res. 217, 20 *UNSCOR, Resolutions and Decisions 1965*, pp. 8-9.)

Notice, it approaches the words "a threat to international peace and security", but does not use them, and as a consequence the operative paragraphs in that resolution are all recommendatory. The United States indeed emphasized that the resolution had been adopted under Chapter VI (20 *UNSCOR*, 1265th meeting, p. 5).

The ensuing months saw continuous pressure on behalf of the African States to move the situation from Chapter VI to Chapter VII. In May of 1966, the United Kingdom returned to the Security Council for authorization to use force to intercept oil cargoes bound for Rhodesia on the high seas. Its draft resolution, ultimately adopted, recites that oil tankers were discharging cargoes at Beira in Mozambique for transshipment to Rhodesia. The United Kingdom draft "*Determines*" that the resulting situation constitutes "a threat to the peace". That is very close, but it does not say "a threat to international peace and security". It "*Calls* upon the Government of the United Kingdom . . . to prevent, by force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia . . ." (SC res. 221, 21 *UNSCOR, Resolutions and Decisions 1966*, pp. 5-6). Although no sanctions were voted, the resolution was thought to legalize such naval action; and the resolution was informally referred to in the United Nations as a Chapter VI½ action.

Finally, in November 1966, after negotiations between the Wilson Government and the Smith régime collapsed, the Security Council moved unequivocally to Chapter VII. Resolution 232 of 16 December 1966 made the required Article 39 determination. It "*Determines* that the present situation in Southern Rhodesia constitutes a threat to international peace and security" and "*Decides*" to impose comprehensive mandatory economic sanctions against Rhodesia (21 *UNSCOR, Resolutions and Decisions 1966*, p. 109). That was the first time that Article 41 was invoked in its mandatory form in the United Nations.

What do we derive from this account? In the entire year of Security Council consideration, there was no significant military action aside from a few desultory guerrilla encounters. There was certainly nothing that could be deemed an armed attack or an act of aggression in the traditional sense. Nor did the situation on the ground change significantly during the year.

What changed was the Security Council's political willingness to use mandatory economic sanctions. A perusal of the Security Council debates reveals that very little time was spent discussing whether the situation was really, in some objective sense, a threat to peace and security. The issue to which the delegates address themselves is whether the time has come to impose sanctions, or whether to give the United Kingdom more time to seek a voluntary solution. When time ran out, the Council made the determination under Article 39, not because of anything that had happened in Rhodesia, but to give effect to its will.

The same understanding of the effect and meaning of Article 39 appears whenever the Council is asked to take action under it. The very first time the issue arose, in 1948, the United States had introduced a draft resolution with an Article 39 determination, and the resolution "ordered" a ceasefire in the Israeli war of independence. The resolution that was adopted omitted the reference to Article 39 and called upon the parties to observe a ceasefire. The United States opposed these changes on the grounds that they would transfer the case from Chapter VII of the Charter into Chapter VI (*UNSCOR*, 1948, 296th meeting, p. 6).

Moreover, the United States representative argued that, for Chapter VII action, "We do not have to determine . . . who is the aggressor, who is at fault, if both parties are at fault, or which one is more at fault than the other." (*Ibid.*, p. 9.)

That is to say, the Article 39 determination depends on political requirements, not legal rights and wrongs. In that case too, incidentally, the Council, after some delay, moved from Chapter VI to Chapter VII, and it did so by making the requisite determination under Article 39.

The United States has not always taken the purist view of the separation of functions between Court and Council that it now maintains in its Counter-Memorial. Professor Pellet called attention to the United States comment in the Security Council in connection with the *Aerial Incident* case. But in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft, and one case, the *Aerial Incident* case, involving the downing of an Israeli civil aircraft bearing United States citizens. (See United States *v.* Hungary, United States *v.* USSR, *I.C.J. Pleadings* (1954), pp. 9-10; United States *v.* Czechoslovakia, *I.C.J. Pleadings* (1956), pp. 8-9; United States *v.* USSR, *I.C.J. Pleadings* (1956), pp. 9-14; United States *v.* Bulgaria, *I.C.J. Pleadings* (1959), pp. 22-25; United

States v. USSR, *I.C.J. Pleadings* (1958), pp. 8-10; United States v. USSR, *I.C.J. Pleadings* (1959), pp. 8-11.) Presumably all of these attacks by military planes of one power against military planes of the other involve use of force within the meaning of Article 2 (4). Of course, none of the respondents in these cases submitted to the compulsory jurisdiction of the Court, and so none of them were heard. Nevertheless, the United States avidly pursued a judicial settlement in each of them, without suggesting or perceiving any difficulty about invading the exclusive competence of the Security Council.

The structure and language of the Charter, and the uniform experience under Article 39 shows that a determination under that Article is simply a procedural prerequisite for transferring the case from Chapter VI to Chapter VII, so as to provide a basis for invoking the Council's powers under Article 41 and Article 42. Indeed, the Court itself has intimated that without such a determination even the Council could not authorize "military action against any State" (*Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 177).

The record shows that the existence of threat or armed attack in violation of Article 2 (4) is not a prerequisite for a determination under Article 39. Conversely, by no means every violation of Article 2 (4) requires "action" by the Security Council under Article 39 and Chapter VII.

From a juridical standpoint, the decisions of the Court and the actions of the Council are entirely separate. If, in a case properly before it, the Court should decide that the Respondent has violated Article 2 (4), the decision would not give rise to any consequent duty of the Security Council to act under Article 39. Even if the Applicant were to seek enforcement of such a decision under Article 94, the Security Council would still have to make an independent determination under Article 39 in order to take enforcement action. And it would be free to do so or not, as "it deems necessary" in accordance with its judgment as to the requirements of the situation (United Nations Charter, Art. 94 (2)).

By the same token, the failure of the Court to find a violation of Article 2 (4) in a case presented to it cannot preclude the Security Council — if it deems necessary — from making a determination under Article 39 with respect to the situation out of which the case arises.

Before leaving this portion of the discussion, I shall comment briefly on the United States argument about Article 51. Again, the United States Counter-Memorial indulges a penchant for truncated quotation. In a three-page discussion of Article 51 bristling with references to "the inherent right of self-defense" in every paragraph, only once, and then in an oblique footnote, does it appear that Article 51 is concerned with the inherent right of self-defence "if an armed attack occurs against a Member of the United Nations" (II, Counter-Memorial, paras. 515-519, and p. 164, note 2).

There is, as the Court knows, no generalized right of self-defence. There is no right "to engage . . . in proportionate measures to respond to unlawful use of force having different, less conventional, characteristics [than armed attack]" as suggested in the Counter-Memorial (II), at page 164, note 2. There is no right to use force in "countermeasures in respect of internationally wrongful acts falling short of an 'armed attack'" (*ibid.*). There is no right in the absence of an armed attack, to provide upon request "proportionate and appropriate assistance to third States" when such assistance takes the form of use of force against another State (*ibid.*, p. 165).

The inherent right of self-defence is deliberately and comprehensively qualified by the language of Article 51. It is not available unless "an armed attack occurs against a Member of the United Nations".

In Secretary of State Shultz's affidavit and in the petition of El Salvador to intervene in these proceedings, it is now asserted, for the first time, that Nicaragua is engaged in an armed attack against another State (Counter-Memorial, Ann. 1, **II**, p. 177, para. 3; Declaration of Intervention of El Salvador, 15 August 1984, **II**, p. 452). This is not the place to go into the merits of that assertion. But it may be noted that the supporting factual allegations, even if they were all true, fall far short of an "armed attack" within the meaning of Article 51.

The argument advanced in the Counter-Memorial with respect to Article 51 consists of the unsupported assertion that the question of the legitimacy of actions assertedly taken in self-defence is committed exclusively to the Security Council. It is simply a repackaging of the argument under Article 39.

There is no doubt that such actions — that is actions under Article 51 — "must be immediately reported to the Security Council". Article 51 says so. If the United States is truly exercising its Article 51 rights, one wonders why it has failed to comply with these reporting requirements. It is true, as the Counter-Memorial asserts, that the Security Council has "been made aware of the situation claimed by Nicaragua to exist in Central America" (Counter-Memorial, **II**, p. 165, note 1). So has every reader of the newspapers. But we will search the records of the Security Council a long time before we will find a communication formally reporting that, in the exercise of the inherent right of self-defence of the United States, the CIA is organizing, supplying and directing a covert mercenary army in attacks on Nicaragua.

Article 51 also says that nothing shall impair the right, that is the inherent right of self-defence if an armed attack occurs on a member State, "until the Security Council has taken measures necessary to maintain international peace and security". But the right secured from impairment is the inherent right of self-defence against armed attack. On that issue, above all, a State should not be permitted to be judge in its own cause. Yet that is exactly what the United States position amounts to. Judge Sir Hersch Lauterpacht said in the *Function of Law in the International Community* (pp. 179-180):

> "It is of the essence of the legal concept of self-defence, that recourse to it must, in the first instance, be a matter for the judgment of the State concerned ... When, therefore, Governments and writers insist that recourse to self-defence is not subject to judicial determination, they give expression to self-evident truism — so long as it is clear that what is permitted is the provisional right to act.
>
> The other meaning usually attaching to the assertion of the non-justiciability of disputes arising out of recourse to force in self-defence is that the legitimacy — as distinguished from the act itself — of the exercise of the right of self-defence is incapable of judicial determination. This doctrine cannot be admitted as juridically sound. If the concept of self-defence is a legal concept — and it becomes so, *inter alia*, by becoming part of a treaty or declaration organically connected with it — then any action taken under it must be capable of legal appreciation.
>
> There is not the slightest relation between the contents of this right of self-defence and the claim that it is above the law and not amenable to evaluation by law. Such a claim is self-contradictory inasmuch as it purports to be based on legal rights and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defence is in itself capable of judicial decision; and it is only the determination of States not to have questions of this nature decided by a foreign tribunal which may make it non-justiciable."

I submit that the foregoing was good law in 1933, when Judge Lauterpacht first said it, and it is good law today. It is only the determination of the United States not to have its action reviewed by a foreign tribunal — a determination that has been evident in every stage of this proceeding from the Shultz letter of 6 April 1984 onwards — which may make it non-justiciable.

To accept the United States argument would be to stand the Charter on its head. Article 2 (4), the linch-pin of the legal regime of the Charter, precludes the use of force in international relations. That sweeping prohibition was subject to a narrow and limited exception in Article 51. That exception cannot be turned into a "self-judging reservation" without destroying the scheme of the Charter. Yet that is just what the position urged here by the United States would do.

Where does the United States discover the conception that underlies its argument, the conception of an international system rigidly compartmentalized, with functions assigned exclusively to one organ or another? I indulge here a bit of professorial curiosity. Surely it does not get that idea from the pronouncements or actions of the Court. I will not review again the many judgments and cases in which the Court has rejected this notion of exclusive assignment of competence (**I**, Memorial, pp. 97-113). And as we have shown, it is surely not derived from the practical experience of the United Nations in four decades of trying to cope with the problems of maintaining international peace and security. (For a review of the cases and experience, see Memorial, **I**, paras. 184-212.)

I think the answer is that the United States argument is an attempt to project American separation of powers thinking upon the very different set of institutions and organs that comprise the international system. Thus, for example, the Counter-Memorial in its discussion of these issues from time to time uses the phrase "textual commitment" (e.g., **II**, Counter-Memorial, paras. 455, 458). There is said to be a "textual commitment" of certain powers to one organ or another. While the phrase is perfectly understandable, it is not to be found in the language of the opinions of the Court nor in the works of international publicists. It was used first by United States Supreme Court Justice William Brennan in his opinion in *Baker* v. *Carr* (369 US 186, 217 (1962)), and it has become a touchstone in the elaboration of the "political question" doctrine in American jurisprudence. I refer you to *Powell* v. *McCormack* (395 US 486, 519 (1969)) and an article by Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (73 *Harv. L. Rev.* 1, 7-9 (1919)). But there are many, many references which would support that proposition.

This phenomenon of seeking to transfer United States separation of powers concepts wholesale to the international plane is not uncommon among American lawyers. As the Court may be aware, I have indulged in it myself on occasion. But longer and more careful reflection on the structure of the international system makes it clear that these concepts are not applicable, certainly in anything resembling their undiluted form, to the relations among international institutions for the settlement of disputes.

The American Constitution was an explicit effort to allocate all the powers of a single, sovereign federal government among three major branches. The powers do not overlap. The main structural principle of the Constitution is that no branch should invade or exercise the powers given to another. Indeed each branch was given powers to defend itself against the encroachments of others. This was the scheme of "checks and balances", so dear to the framers of the American Constitution. In practice over two centuries, of course, the system has not worked in any such rigid and abstract way. But that was the architectural plan.

It is not the architectural plan of the United Nations. The problem facing the framers at San Francisco, unlike that at Philadelphia, was not how to divide the whole body of governmental powers among the branches of one sovereign government. It was to provide a variety of organs and institutions through which a multiplicity of sovereigns could work co-operatively on matters of common concern and that they could use to adjust the frictions and disputes necessarily arising in a community of sovereign and equal States. The solution was clearly not to distribute powers in a number of watertight compartments. It was to provide a broad menu of institutional forms that States could use as they saw fit in the pursuit of their own purposes.

It is tempting for Americans to see in the United Nations, for example, the shadow of a bicameral legislature, and in the International Court of Justice a reflection of our own Supreme Court. But that is to distort institutional reality. The Charter provides a Secretary-General, a Secretariat, an Economic and Social Council, a Trusteeship Council. There is a multiplicity of specialized United Nations agencies, each with its own charter and its peculiar set of legal and political relations to the United Nations. These have no analogues in the American system. And the idea of exclusive competences does not fit well in this environment.

That is not to say there are no limits to what a particular organ or institution may do.

A court after all is a court. Its function is to decide cases in conformity with the methods and using the materials familiar and traditional in the discipline of the law. It is not supposed to make generalized political pronouncements. But there is nothing that prevents an international court, and especially this Court, from deciding a case at law, properly before it, merely because another body has competence with respect to or even is actually seised of the same general subject-matter.

Indeed, Mr. President, and Members of the Court, it is not a coincidence that this Court and its predecessor, the Permanent Court, came into being in the wake of great world wars. They are the product of the yearning of people everywhere for a world of peace under law. In the judgments of courts, they sought protection from the clash of arms.

It is true that the Court cannot by its own activities bring about a peaceful world. It is true also that in its day-to-day work in the peaceful settlement of international disputes, the Court does not ordinarily confront the issues of peace and war in such stark terms.

But when the Court is asked to determine the legal rights and obligations of the parties in a dispute concerning the use of force by a large and powerful State against a small and weak one, it is called upon to perform the essential function that gave it birth.

This is such a case.

We have established the following conclusions:

The Court has jurisdiction of this case by virtue of the declaration of Nicaragua of 24 September 1929 and the declaration of the United States of 14 August 1946, both of which by their terms comprehend the present dispute.

The Nicaraguan declaration is effective by virtue of the operation of Article 36 (5) of the Statute of the Court and by virtue of a course of conduct over 38 years by the parties to this case and other relevant States and international bodies.

The letter of the Secretary of State of 6 April 1984 to the Secretary-General of the United Nations is ineffective to suspend, modify or terminate the United States declaration; and the third reservation to that declaration does not cover this dispute.

The Application in this case is in all respects admissible. Neither the character of this controversy, the actions of formal or informal international bodies, the existence of a parallel political negotiation, nor any provision of the United Nations Charter, or other provision of law prevents the Court from hearing this case.

The Court should now decide to proceed to the merits.

Thank you, Mr. President, Members of the Court.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Court.

The Court has now listened to the learned expositions of Nicaragua's counsel.

Nicaragua feels very grateful to the eminent international lawyers who have given it such a highly professional counsel.

Nicaragua could not have brought this case before this high tribunal without their help, because Nicaragua does not have lawyers trained and experienced in international law.

Nicaragua came before this Court with the firm conviction that it was bound by its jurisdiction. The legal conscience of Nicaragua has lived for almost 40 years under the conviction that Nicaragua was subject to the jurisdiction of this high tribunal.

For this reason it came as a surprise to Nicaragua that there should be any question about this. Our surprise was not about the existence of a footnote, which we considered only as of historical interest about Nicaragua's situation with respect to the defunct Permanent Court. Our surprise was about the presumed consequences that that footnote had.

Professor Brownlie has given a vivid description of what an experienced government legal adviser would do if he were investigating whether Nicaragua had accepted the compulsory jurisdiction of the Court. Such a lawyer would check the publications of this Court, of the Secretary-General of the United Nations, publications of other nations (for example, *Treaties in Force*) and of course the writings of eminent scholars. In all of these he would find a listing of Nicaragua.

Well, Nicaragua does not have eminent scholars of international law. Nicaragua does not have libraries on international law, or for that matter even adequate records in its Government offices. A Nicaraguan Government legal adviser would be well pleased if he could find the *Yearbook* of this Court and the publications of the United Nations Secretariat to do his research.

This research would leave him perfectly satisfied that Nicaragua was bound by this Court's jurisdiction, and this is what his Government would believe. Could the subsequent conduct of that nation that would feel itself bound to the Court be called insincere?

Could this Court set a higher standard of, let us say, scholarship on a poor and backward nation like Nicaragua than is set on its own Registry and publications? After this case was filed and the question at hand raised, we searched for any communication from this Court to Nicaragua requesting the clarification of this purported irregularity, and have found none.

Further, could a higher standard of scholarship be set on the Nicaraguan Ministry of Foreign Affairs than on the corresponding Ministries of the United States, France, the Netherlands, Sweden and the Federal Republic of Germany, that all listed Nicaragua as bound?

If the Nicaraguan Government legal adviser were faced with a case before this Court, he would in all honesty probably consult a reputed international practitioner on the affair. This is what Nicaragua did with Professor Bastid in 1956 and the Court has heard the opinion she gave as to the application of Article 36 (5) of the Statute.

As Professor Brownlie expressed the point, there is no "pre-ordained process of certification" for the application of the, let us say, transsubstantiating effects of Article 36 (5) of the Statute. The Nicaraguan legal adviser would be left with the *ad hoc* opinion of an eminent practitioner and of course with all the international publications listing Nicaragua.

Frankly, the Nicaraguan legal adviser would be acting in bad faith if he advised his Government that Nicaragua was not bound.

At the point we have reached, and even before it, we can safely say that the objective world opinion locked Nicaragua inside Article 36 of the Statute. Nicaragua, without acting in bad faith, could not have held a different opinion. At this point, the subjective opinion of Nicaraguan officials could not change what had become a legal reality.

Professor Chayes has analysed documents presented by the United States to try to prove that Nicaragua, Honduras and the United States did not believe that Nicaragua was bound to this Court's jurisdiction. Professor Chayes has amply demonstrated where the truth lies. I have preferred that Professor Chayes explain Nicaragua's position as deduced from certain documents related to the *Arbitral Award Made by the King of Spain on 23 December 1906* case, in order to ensure a more objective presentation before this Court.

The plain truth is that the officials of that period could not have held opinions other than the ones we have explained here. It could not depend on their will to make Nicaragua's declaration valid or invalid.

Returning to the present, it is obvious that Nicaragua in presenting this case has done so under the firm conviction that it has a right to do so.

For all of this, I repeat, it came as a surprise to Nicaragua that on 23 April, 14 days after filing Nicaragua's case, the United States should raise this matter for the first time stating: "The United States wishes to bring to the notice of the Court information that the United States recently received " In all sincerity, Nicaragua feels that this is simply a smokescreen to divert opinion from the real issues involved in this case. Respectfully, we beg the Court to clear the air.

Professors Brownlie and Chayes shattered the legality and effectiveness of Mr. Shultz's letter and of the purported reciprocity on which it also presumes to rely.

I cannot presume to summarize the highly technical expositions on this subject. My only endeavour at this point will be to briefly put before you the impression these arguments have caused in Nicaragua. First of all, we are proud of our early declaration of 1929. We are proud to have accepted international adjudication as compulsory unconditionally and without limit as to time and do not believe it can be changed. Nor would we want it modified in the casual manner the United States claimed to have a right to do with its own declaration.

Second, we understand that were it effective the declaration of Mr. Shultz would be final terminal with respect to Nicaragua.

Third, this declaration was filed one working day before Nicaragua presented its Application. At that time public statements which are recorded in this case were made to the effect that the United States had information that Nicaragua was coming before this Tribunal. Nicaragua did not itself give the United States any notice that it would file this case.

To allow a powerful nation to escape the justice sought by a poor country, because its highly sophisticated resources and technology permitted it to anticipate to the hour when a case would be filed against it, would not be reciprocity and certainly not justice.

Fourth, the declaration of Mr. Shultz is not with the intention as in some previous cases cited of avoiding settling a land dispute or some commercial matter, but of obtaining a free hand to continue what we consider criminal acts against our country. Nicaragua believes that the principle of reciprocity and fairness would be badly served if they were not interpreted "in conformity with the principles of justice" enshrined in Article 1 of the Charter.

Fifth, Nicaragua feels that the same treatment should be given to this declaration of Mr. Shultz as would be given if the tables were turned to a similar declaration of Nicaragua as against its neighbours in Central America.

Sixth, Nicaragua agrees with the condemnation that the American Society of International Law gave to this declaration of Mr. Shultz. The American Society of International Law is a group of eminent scholars. It has not previously taken stands on public issues. It broke with more than 70 years of precedent to denounce the attempt by the United States to escape the jurisdiction of this Court.

I will not tax the Court's time with any further considerations on Contadora, collective self-defence, absence of third parties, etc., because what the passage of time itself has not destroyed since the presentation of our Application, certainly the arguments of Professors Chayes and Pellet and Mr. Reichler have done so.

We have, Mr. President, made it a point of honour to respect the indications which you gave us regarding the necessity of being as concise as possible in not repeating the contents of the Memorial.

These considerations have led us to omit a certain number of arguments which we developed in our Memorial and which we still assert.

This is the case, for example, with regard to the Treaty of Friendship, Commerce and Navigation concluded on 27 January 1956.

Nicaragua maintains that this Treaty constitutes a subsidiary basis for the Court's jurisdiction in the present proceedings.

SUBMISSIONS

In concluding my address, it is appropriate to present the submissions made on behalf of the Government of Nicaragua.

Mr. President, the submissions are as follows:

Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua:

The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety.

Mr. President, Members of the Court:

This case has aroused worldwide interest not because of the technical legal problems involved, but because the world's hope for peace is placed on the possibility of a small nation obtaining sanctuary in this Palace of Peace. Nicaragua is here before you sincerely hoping there is a way for peace through law on this earth.

With this, Mr. President, Members of the Court, we end Nicaragua's presentation.

On my behalf and of Nicaragua's counsel we thank you, Mr. President, Members of the Court, for your attention.

The Court rose at 12.45 p.m.

TENTH PUBLIC SITTING (15 X 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

STATEMENT BY THE PRESIDENT

The PRESIDENT: Before giving the floor to counsel for the United States, it is my sad duty to observe a tradition of the Court to record the passing of sitting Members of the Court by paying tribute to their memory. Since the last public sitting of the Court, two former Members have died.

One of them was Judge Louis Ignacio-Pinto, who passed away on 24 May 1984. Educated in Dahomey, Nigeria, and France he practised law in Paris, Conakry and Cotonou before becoming a Senator of the French Republic for Dahomey in 1946. He subsequently had a very distinguished career in government and diplomacy beginning as Minister of Economic Affairs, Commerce and Industry in the first Dahomey Government, and later holding numerous ambassadorial posts including that of Ambassador of Dahomey to the United Nations. He had been a member of the International Law Commission of the United Nations, having also served on the Sixth Committee of the General Assembly. He came to the Court as President of the Supreme Court of Dahomey. In the field of international organizations he had held a number of important posts. His contribution to the work of the Court was unfortunately limited by serious illness which struck him down about half way through his term of office, but was nonetheless valuable for that.

More recently the sad news reached the Court of the death of Judge Vladimir Koretsky, Member of the Court from 1961 to 1970, and Vice-President in the last three years. Judge Koretsky, who studied at the universities of Moscow and Kharkov, was Legal Adviser to the Soviet Delegation to the First Session of the United Nations General Assembly and subsequent sessions, and to the Council of Foreign Ministers in the first Peace Conference in 1946. He was representative of the USSR in several intergovernmental organizations and was a member of the International Law Commission. He was a member of the Permanent Court of Arbitration, Vice-Chairman of the Soviet International Law Association, and a member of the Academy of Sciences of the Ukrainian Soviet Socialist Republic, Kiev. Apart from his work at the Court and in the United Nations, he was the author of more than 50 works and articles on public and private international law and on general history of the state of the law.

I now ask all those present to stand for one minute of silence in tribute to the memories of Judges Louis Ignacio Pinto and Vladimir Koretsky.

Please be seated. I now call on the Agent of the United States to begin.

ARGUMENT OF MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Members of the Court. May it please the Court.

It is an honour to argue once again in 1984 before the International Court of Justice in the representation of my country. The United States maintains now, as it did in April, that this Court is manifestly without jurisdiction over Nicaragua's claims. By appearing again to argue this conviction, the United States reaffirms its commitment to the rule of law in international relations, and its faith and expectation that this Court will rule on the issues presently before it in accordance with that law.

The United States welcomes this opportunity to present to the Court its views in oral argument on the questions of the jurisdiction of the Court and the admissibility of Nicaragua's Application of 9 April 1984. The positions of the United States are set out in detail in the United States Counter-Memorial of 17 August 1984. In accordance with Article 60 of the Rules of Court, the United States will focus in oral argument on those issues that still divide the Parties. We shall do our best, Mr. President, to follow your entreaty for conciseness and non-repetition.

Mr. President, the context in which our argumentation on jurisdiction and admissibility will be made must be set forth at the outset.

This case arises out of events in Central America, specifically armed hostilities, occurring throughout that region. As the United States will explain, those armed hostilities are relevant to many of the issues under consideration in this phase of the proceedings. Conversely, and more importantly, these judicial proceedings have significant implications for current diplomatic efforts to bring that conflict to an end.

The United States invites the Court's attention to three specific features of the armed hostilities in Central America: first, that those hostilities extend across State borders and involve all the States of the region; second, that, although there are complex economic, social and political causes that underlie the hostilities, the hostilities also have a more direct cause — the armed attacks of Nicaragua against its neighbours; and third, that a durable peace in Central America can only be expected from multilateral negotiations among all the interested States that comprehensively address the economic, social, political and security problems that plague the region.

Such negotiations are already under way in the Contadora process, a framework that has been endorsed by the United Nations Security Council and the Organization of American States. All of the Central American States, including Nicaragua, have agreed to the Contadora process. It is the view not only of the United States but also of all the Central American States other than Nicaragua that adjudication by this Court of Nicaragua's bilateral claims may be expected to hinder, not assist, those delicate negotiations.

United States Secretary of State Shultz summarized the multilateral character of the disputes in Central America in his sworn affidavit of 14 August 1984, submitted with the United States Counter-Memorial:

> "There has been widespread recognition that, despite Nicaragua's efforts to portray the conflict as a bilateral issue between itself and the United

> States, the scope of the conflict is far broader, involving not only cross-border attacks and State support for armed groups within various nations of the region, but also indigenous armed opposition groups within countries of the region. It has been further recognized that under these circumstances, efforts to stop the fighting in the region would likely be fruitless and ineffective absent measures to address the legitimate economic, social and political grievances of the peoples of the region which have given rise to such indigenous armed opposition." (Counter-Memorial, Ann. 1, **II**, p. 178.)

In a statement in April to the Security Council of the United Nations by its representative, Honduras similarly stated:

> "[T]o cast the Central American problem in terms of Nicaragua's interests . . . is a conceptual error. It is not just one country which is affected; it is not only one country which is suffering from conflicts. It is not only one people which is suffering and bewailing the fate of its children . . . It is a Central American problem . . . and it must be solved regionally." (Counter-Memorial, Ann. 60, UN doc. S/PV.2529, **II**, p. 324.)

To the same effect, the Government of Costa Rica advised this Court on 18 April 1984:

> "The 'case' presented by the Government of Nicaragua touches upon only one aspect of a more generalized conflict that involves other countries within the Central American area as well as countries outside the region." (**II**, Counter-Memorial, Ann. 102.)

And El Salvador stated to the Court in its 15 August 1984 declaration of intervention that:

> "In [its] view everyone has acknowledged that the Central American phenomenon has moved beyond the scope of simple bilateral treatment and has become a regional issue entailing the participation of multilateral interests." (Declaration of Intervention of 15 August 1984, **II**, p. 457.)

Nicaragua's attempt to characterize the dispute underlying its claims as bilateral is thus belied not only by the views of the United States but also by the official views of the other Governments of Central America.

Nor can there be any serious dispute that Nicaragua aids, abets, incites, provokes, and often initiates armed attacks against its neighbours. Thus, Secretary of State Shultz observed in his affidavit of 14 August 1984:

> "The information available to the Government of the United States through diplomatic channels and intelligence means, and in many instances confirmed by publicly available information, establishes that the Government of Nicaragua has, since shortly after its assumption of power in 1979, engaged in a consistent pattern of armed aggression against its neighbors. Other responsible officials of the United States Government, including the President and the responsible committees of the United States Congress having access to such information, share this view." (Counter-Memorial, Ann. 1, **II**, p. 177.)

In confirmation of Secretary Shultz's statement, it may be noted that, in December 1983, the United States Congress made an explicit statutory finding that Nicaragua was "providing military support (including arms, training, and logistical, command and control facilities) to groups seeking to overthrow the Government of El Salvador and other Central American Governments" (Counter-

Memorial, Ann. 42, Stat. 1473, **II**, p. 277). More detailed findings with respect to Nicaragua's aggression against its neighbours may be found in a May 1983 report of the Permanent Select Committee on Intelligence of the United States House of Representatives, which is quoted at **II**, page 57, of the United States Counter-Memorial.

The States of Central America confirm the conclusions of the United States in this regard and have so informed this Court. The Government of the Republic of El Salvador, for example, stated:

> "El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua and feels threatened in its territorial integrity, in its sovereignty, and in its independence, along with the other Central American countries . . . El Salvador comes here to affirm before the International Court of Justice and before the entire world, the aggression of which it is a victim through subversion that is directed by Nicaragua, and that endangers the stability of the entire region." (Declaration of Intervention of 15 August 1984, **II**, p. 451.)

The representative of Honduras stated to the United Nations Security Council in April of this year — just a few days before Nicaragua's Application was filed:

> "My country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population. Those elements which have obliged Honduras[1] to strengthen its defences are mainly the disproportionate amount of arms in Nicaragua, the constant harassment along our borders, the promotion of guerrilla groups which seek to undermine our democratic institutions, and the warmongering attitude of the Sandinist commanders." (Counter-Memorial, Ann. 60, UN doc. S/PV.2529, **II**, p. 324.)

To the same effect, the Government of Costa Rica has repeatedly made diplomatic representations to Nicaragua protesting "attack[s] on Costa Rica territory . . . and on members of the armed forces of Costa Rica", "gratuitous aggression" by Nicaragua; and "flagrant violations of the national territory" of Costa Rica (Counter-Memorial, Ann. 63). Numerous other examples of statements by Central American Governments complaining of Nicaragua's aggression toward them, and additional evidence confirming those complaints, may be found in the United States Counter-Memorial and the Annexes thereto.

Nicaragua, Mr. President, has repeatedly made sanctimonious statements to this Court, including a sworn statement by Nicaragua's Foreign Minister, that Nicaragua is not engaged in armed attacks against its neighbours. Mr. President, as we have just shown, these statements are directly contradicted by the public statements of all of Nicaragua's neighbours and by all of the senior United States officials — in both the executive and the legislative branches — with access to the full range of relevant diplomatic and intelligence information.

The bloodshed in Central America extends throughout Central America, and one of its principal causes is the aggression of Nicaragua.

The question that all responsible statesmen must ask is, how can this bloodshed most effectively be ended? The States of Central America, including Nicaragua, have agreed that the multilateral Contadora negotiations offer the best hope for a lasting peace in the region. The United Nations Security Council, the Organization of American States, and, most recently, the Foreign Ministers of the European Community have all endorsed the Contadora negotiations.

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[1] Original states "Nicaragua" here. This was corrected by a letter of 25 April 1984 from the Government of Honduras to the Secretariat of the United Nations. See last, unnumbered page of United States Annex 60. [*Not reproduced.*]

The United States, too, supports the Contadora negotiations and is engaged in bilateral negotiations with Nicaragua in support of those multilateral talks. Just 10 days ago in New York, at the United Nations General Assembly session, Secretary of State Shultz cited the Contadora process as "an outstanding example" of how States may resolve their most bitter disagreements. Secretary Shultz then observed that Contadora "can lead to negotiated arrangements under which stability and peace and economic development are much more possible. We support that process."

In its oral presentation to the Court last week Nicaragua attempted to portray the United States of America as a major obstacle to the successful achievement of Contadora's objectives. Nicaragua argued at that time, that it is willing to sign a draft agreement, the so-called "Acta" and that only the United States is preventing the general acceptance of that draft by all the Central American States. Mr. President, nothing could be farther from the truth.

Contrary to Nicaragua's assertions, the United States has welcomed the 17 September draft Acta as a significant advance in the Contadora process. The Court will see from examining the document (Documents Submitted by the United States, *infra*, p. 320, No. 1) that the 17 September draft Acta is only what it purports to be — a draft. The document contemplates comments by interested parties. Those comments, indeed, are due today — 15 October 1984.

The United States has objected only to Nicaragua's demands that the Central American States halt their negotiations and make a final agreement from what is on its face an intermediate draft. The present draft is clearly incomplete with respect to several of the most important issues. By way of example, the Court will note that the draft Acta contemplates that there will be a commission for verification and control to verify the commitments to end illegal trafficking in arms and support to paramilitary forces. The commission will thus be required to conduct surveillance in the five States of the region, along thousands of miles of border and coastline, through jungle and mountainous terrain. Yet, the draft Acta fails to specify the composition of the commission, it fails to provide for a budget or staff, and it fails to determine the location of the commission's headquarters and field offices.

What is important to emphasize here is that the view that further changes are necessary is shared by all four of the Central American States other than Nicaragua and by the four Contadora States themselves — Mexico, Colombia, Venezuela and Panama. All of these States have made statements indicating that further negotiations are necessary. This view is also shared by the States of Western Europe, as reflected in a joint communiqué of 29 September of the Foreign Ministers of the European Community, Portugal, Spain, the Central American States, and the Contadora States, all meeting in Costa Rica. The joint communiqué specifically describes the draft Acta as a "stage" in the Contadora negotiations, not as the conclusion of the negotiations (Documents Submitted by the United States, *infra*, p. 341, No. 2).

Mr. President, Nicaragua alone wishes to stop the Contadora negotiating process at the stage of an intermediate draft agreement. Under these circumstances, Nicaragua cannot plausibly contend that it is the United States that is blocking progress in those negotiations.

Just as it is Nicaragua alone that seeks to prevent further Contadora negotiations, it is Nicaragua alone that seeks to adjudicate bilateral aspects of those multilateral negotiations before this Court. Again, it is useful to quote the other

Central American States in this regard. Thus, El Salvador stated in its letter to the Court of 17 September 1984:

> "El Salvador is persuaded *in the considerations of its own survival as a nation* that to subject an isolated aspect of the Central American conflict to judicial determination at this time would cut straight across the best hopes for a peaceful solution . . ." (Emphasis added.)

To the same effect, Honduras advised the Secretary-General of the United Nations on 18 April 1984 as follows:

> "Once again the Government of Nicaragua is seeking to flout the Contadora negotiation process by attempting to bring the Central American crisis, essentially a political issue, under the jurisdiction of the International Court of Justice. This is detrimental to the negotiations in progress and fails to recognize the resolutions of the United Nations and the Organization of American States or the full international endorsement that the Contadora peace process has so deservedly received." (**II**, Counter-Memorial, Ann. 104 — **I**, p. 309.)

In a press release of 16 April 1984, Guatemala stated:

> "The Central American issue should be discussed by the Contadora Group; [and] any attempt to seek another forum or international body in order to discuss security problems of a political, economic, and social nature has a negative impact on the Contadora process." (**II**, Counter-Memorial, Ann. 105 — **I**, p. 310.)

And Costa Rica advised this Court in April:

> "Whatever measures which the Court might adopt in the 'case' presented for its consideration, taking such measures outside the context of the complete political and military situation that prevails in the Central American region, could become a distorting factor in the difficult equilibrium sought by the Forum of Contadora in a broader framework of solutions and could compromise, if not undertaken with prudence and equity, all possibilities of success for the 'Forum of Contadora'." (**II**, Counter-Memorial, Ann. 102 — **I**, p. 306.)

There is, therefore, Mr. President, unanimous agreement among the Central American States other than Nicaragua that adjudication of Nicaragua's claims by this Court seriously risks undermining the possibilities for Contadora's achievement of peace in Central America. Surely, this apprehension will come as no surprise to the experienced statesmen and jurists of this Court.

Complex multilateral negotiations require a delicate balance of concessions and compromises. If, in the midst of such negotiations, one party achieves some or all of its negotiating objectives elsewhere, the balance of concessions and compromises may be irretrievably upset. Indeed, the negotiating equilibrium may be profoundly disturbed if the parties even believe that one of them may achieve its objectives elsewhere. As Secretary Shultz observed in his 14 August affidavit:

> "The United States considers . . . that in the current circumstances involving ongoing hostilities, adjudication is inappropriate and would be extremely prejudicial to the existing dispute settlement process . . . To permit one party to create a parallel dispute settlement process dealing with only one aspect of the dispute and of the issues required to be addressed in a comprehensive solution would affect adversely the current multilateral and bilateral negotiating processes encompassed in the Contadora framework.

> and could, in the opinion of the United States, delay, if not forestall, an end to the fighting." (Counter-Memorial, Ann. 1, **II**, p. 180.)

Mr. President, the potential problems for the Contadora negotiations are not the only fundamental issues raised by the present proceedings. The present proceedings also raise basic questions with respect to the nature of this Court's jurisdiction and the functioning of the United Nations system as a whole. At issue are, *inter alia*, the allocation of functions among the institutions of the United Nations by the United Nations Charter, and the principles of State consent, reciprocity, and equality of States that are the fundamental premises for this Court's jurisdiction over disputes between sovereign States.

The specific arguments of the United States with respect to jurisdiction and admissibility must, therefore, be viewed in light of (1) the relationship of these judicial proceedings to the current diplomatic efforts to end armed hostilities in Central America; (2) the implications of accepting jurisdiction over Nicaragua's Application for the continued viability of the compulsory jurisdiction of this Court; and (3) the proper relationship of this Court to other United Nations organs.

The United States will make five specific arguments in this regard during this round of oral proceedings.

First, Nicaragua has never accepted the compulsory jurisdiction of this Court under the Optional Clause contained in Article 36 of this Court's Statute. Nicaragua does not, therefore, have the legal right to invoke that jurisdiction against the United States. This argument presents this Court with the unprecedented question of whether a State that has never agreed to be a respondent may now appear before the Court as an applicant. The plain terms of the Court's Statute, supported by an overwhelming mass of secondary evidence, indicate that it may not. It would, moreover, transgress the basic notions that underlie this Court's adjudicative function: first, the requirements of sovereign consent to any judicial process; second, the need for reciprocity of obligation between the States concerned; and third, the sovereign equality of States. These fundamental tenets of legal relationships among nation States will be violated if Nicaragua is permitted to present claims before this Court after decades of Nicaragua's knowing refusal to submit itself to claims by other States. It will be the privilege of the Agent of the United States to address this fundamental jurisdictional defect that results from the manifest failure of Nicaragua to accept the compulsory jurisdiction of this Court.

Second, jurisdiction is necessarily absent because the United States, too, has not consented to adjudication in the circumstances of this case. Nicaragua's claims come within the scope of a reservation to the United States 1946 declaration known as the "Multilateral Treaty Reservation". This argument requires the Court to apply the plain language of one of the basic conditions upon which the United States consented to this Court's compulsory jurisdiction under the Optional Clause. This point has additional significance because five other States have identical or similar reservations to their declarations. Thus, the Court's interpretation of the reservation of the United States will necessarily affect their rights as well. Deputy-Agent of the United States, Patrick Norton, will discuss this reservation following the presentation of the United States Agent. And it is a privilege, Mr. President, to have had the opportunity to work with such an able and outstanding colleague.

Third, Nicaragua's claims come squarely within the terms of a 6 April note to the Secretary-General of the United Nations that temporarily modified the United States 1946 declaration before Nicaragua's Application was filed on

9 April 1984. Irrespective of the applicability of the Multilateral Treaty Reservation, Nicaragua's claims are excluded by the 6 April note from the scope of the United States consent to this Court's jurisdiction. This argument also goes to the very root of this Court's compulsory jurisdiction, that is, to the mandatory requirement of State consent. The question is: does the Court have jurisdiction under Article 36 (2) of its Statute when, before an application is filed, a declarant State indicates unequivocally that it does not consent to this Court's adjudication of the claims involved? State practice and the jurisprudence of this Court require a ruling that the Court does not have jurisdiction under these circumstances. It is my honour, and the honour of the United States indeed, that the effect and validity of the 6 April note will be explained by Professor Myres McDougal, Sterling Professor of Law, Emeritus, of the Yale Law School, and Professor of Law of the New York Law School.

Fourth, Nicaragua's Application requests, in effect, a determination by this Court to perform the functions that the Charter of the United Nations confides to the political organs, in particular the Security Council, with respect to situations of on-going armed conflict. The Nicaraguan Application concedes that its claims before this Court are identical to those it placed before the Security Council in connection with its request that the Council determine the existence of a threat or breach of the peace, or of acts of aggression.

The April Application of Nicaragua therefore presents one of the most important institutional questions that has ever come before this Court — the proper allocation of functions among the institutions of the United Nations. Nicaragua's claims are entrusted by the United Nations Charter to resolution by the political organs of the United Nations, and in this case to resolution by the regional arrangement known as the Contadora process — not to this Court. It is the privilege of the United States that this question will be addressed by the renowned authority on the United Nations Professor Louis Sohn, Woodruff Professor of International Law at the University of Georgia Law School and Bemis Professor Emeritus at the Harvard Law School.

Fifth, regardless of whether this Court has jurisdiction *stricto sensu*, the Nicaraguan Application is also inadmissible on each of four additional and separate grounds. The Application would necessarily present the legal interests of States not party to the case as the very subject-matter of decision. The Application would necessarily interfere with universally endorsed regional negotiations to end an on-going armed conflict. The Application would necessarily disrupt the political mechanisms to which the Charter has entrusted situations of on-going armed conflict. And finally, the Application would necessarily require adjudication of claims during on-going armed hostilities and, as such, would present severe obstacles to the judicial role of the Court in the discovery of truth and in the fashioning of an effective remedy. I am pleased indeed that these questions will be discussed by Professor John Norton Moore, Brown Professor of Law at the University of Virginia and my colleague in all of the matters that I have had the privilege of addressing before the International Court of Justice in 1984.

Each of the five arguments of the United States is independent. None requires the development of any further record nor any enquiry into the merits of Nicaragua's substantive claims. Each is now before the Court as an immediate basis for dismissal. If the United States is correct with respect to any one of the five arguments, that is, if Nicaragua is unable to meet its burden of persuasion to the contrary on each of these arguments, Nicaragua's Application must be dismissed.

Mr. President, before the United States commences its discussion of the first argument relating to Nicaragua's own lack of consent, we wish to call the Court's attention to the relative responsibilities of the Parties in the present phase of the case. Counsel for Nicaragua has correctly noted (p. 42, *supra*) that, consistent with standard practice in all judicial fora, this Court ruled in the *Temple of Preah Vihear* case that "the burden of proof . . . will of course lie on the party asserting or putting" forward a contention (*I.C.J. Reports 1962*, pp. 15-16). As the Agent of Nicaragua said in a different and inappropriate context in last week's oral proceeding, "The burden of proof is on the accuser" (p. 11, *supra*). Nicaragua asserts that there is jurisdiction over its claims and that its Application is admissible. The burden of sustaining those contentions, in the words of the Court, "will of course lie on" Nicaragua.

This result, moreover, is clearly foreseen by the Rules of Court and reflected in the Orders of the Court to date in this case. Article 38 of the Rules of Court requires: "The Application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based . . ." Article 38 thus indicates that it is the applicant who must satisfy the Court of the "legal grounds" for jurisdiction and admissibility.

Further, the Court's Order of 14 May directed Nicaragua to proceed first in the written pleadings, and the President of the Court, at a meeting with the Agents on 5 October, directed, with no objection from either Government, that Nicaragua proceed first in oral argument. This order of pleading clearly implies that the burden rests with Nicaragua on the issues of jurisdiction and admissibility. The order of pleading also conclusively refutes the suggestion of Nicaraguan counsel last week (p. 41, *supra*) that the case is at the stage of preliminary objections under Article 79 of the Rules of Court. In this regard, Article 79 specifically requires the respondent to plead first when preliminary objections are in issue. That Article 79 is inapplicable in this stage is also made clear by the Court's Orders of 10 and 14 May 1984 which make no reference to that provision. Furthermore, the current procedural stage is in keeping with a line of precedents that began with the *Fisheries Jurisdiction* cases.

Mr. President, the United States would submit that the present phase of proceedings raises analogous considerations to those underlying Article 53 of the Statute of the Court pursuant to which the Court must satisfy itself "that it has jurisdiction". Thus, in at least six prior cases, the Court has directed the applicant, even in the absence of the respondent, to satisfy the Court that it had jurisdiction and the same reasoning applies to questions of the admissibility of the Application. (See the two *Fisheries Jurisdiction* cases, *I.C.J. Reports 1972*, p. 3 at pp. 8-14, and *ibid.*, p. 49 at pp. 54-63; the two *Nuclear Tests* cases, *I.C.J. Reports 1974*, p. 253 at p. 259, and *ibid.*, p. 457 at p. 463; the *Trial of Pakistani Prisoners of War* case, *I.C.J. Reports 1973*, p. 330, and the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, p. 3 at pp. 13 et seq.) Nicaragua bears the same burden here.

Mr. President, with the Court's permission the United States would like to make one final prefatory remark. The United States has for many years been among the strongest supporters of this Court and of international adjudication generally. Consonant with this long-standing history of support for the Court, the United States wishes to emphasize at the outset of these proceedings that it considers the jurisdictional and admissibility questions before the Court today as of grave significance not only for the situation in Central America but also for the continued effectiveness of the compulsory jurisdiction of the Court under the Optional Clause.

Furthermore, it must be recalled that the judicial settlement of international disputes is but one of the proper means of peaceful settlement of certain international disputes. In certain circumstances, like those presented here, the

United Nations Charter specifically requires other means, consistent with State practice of long duration. The various other means of peaceful settlement may, in many instances, be more likely to result in an effective, lasting resolution of a given dispute than the adversarial processes of bilateral adjudication. Among the other means of a peaceful settlement of international disputes endorsed by the Charter is negotiation, such as that now being conducted on a multilateral region-wide basis under the Contadora process. The United States wishes to emphasize that support of such a negotiating process, intended to resolve complex multilateral disputes on an agreed basis, is in no way inconsistent with the general support of the United States for international adjudication.

Nor, by opposing the Court's jurisdiction over Nicaragua's claims, does the United States intend to suggest that international law is inapplicable to the conduct of the United States or to events in Central America. International law governs the situation in Central America regardless of whether this Court adjudicates Nicaragua's claims, just as international law governs the conduct of the vast majority of the member States of the United Nations that, for whatever reason, have never accepted the compulsory jurisdiction of this Court under the Optional Clause.

Mr. President, international adjudication before this Court can only be an efficacious means of peaceful dispute resolution if States respect the authority of the Court. They will do so only if they can expect the determination of their rights in accordance with the law. A State is in particular entitled to expect that any limitations placed on an acceptance of the Court's jurisdiction and any limitations on that jurisdiction arising out of the Charter of the United Nations and the Statute of the Court itself will be fully respected. Only by a scrupulous adherence to this legitimate expectation of sovereign States may international adjudication by this Court continue to serve as an effective peaceful means of international dispute resolution. And only by such scrupulous adherence may this Court play the important role contemplated for it under the Charter of the United Nations.

Mr. President, this completes the introduction and overview of the case on jurisdiction and admissibility that the United States will present during this round of oral proceedings.

With the President's permission, the United States would now like to turn to the first issue, one that is as unprecedented as it is fundamental. This issue is whether Nicaragua, as Applicant, has standing to invoke this Court's contentious jurisdiction. And it is not at this point a question of the meaning of the United States declaration and reservations or modifications thereto. It is a question of whether Nicaragua has ever bound itself to the compulsory jurisdiction of this Court. If Nicaragua has not, as the United States is convinced is the case, Nicaragua's own lack of consent is an unprecedented and fundamental plea in bar to the Court's proceeding with this case.

Nicaragua seems to agree as to the fundamental nature of this question. Last week Nicaragua devoted the largest portion of its oral presentation in an effort to demonstrate that Nicaragua has accepted the Court's compulsory jurisdiction. This is as it should be, particularly given the serious inconsistencies with which Nicaragua has addressed the issue of jurisdiction since the filing of its Application of 9 April 1984.

Mr. President, the issue of the non-acceptance by Nicaragua of the compulsory jurisdiction of this Court has already been presented before the Court at great length and in considerable detail. The need to devote so much attention to this matter has been the direct result of the manner in which Nicaragua has approached the issue. Nicaragua has presented a series of shifting theories, based on shifting assertions of fact, as to why it maintains that it has adhered to this Court's compulsory jurisdiction. Even a casual perusal of the Application of 9 April, of Nicaragua's letter to the Court of 24 April, of Nicaragua's Memorial of 30 June, and of Nicaragua's oral argument last week reveals an extraordinary series of mutually inconsistent arguments. Nicaragua has put forward first one theory and then, after the United States has conclusively refuted that theory, put forward another theory inconsistent with the first. Let us cite one example in particular.

In a letter to the Court of 24 April, and during the subsequent oral proceedings on 25 and 27 April 1984 on Nicaragua's request for the indication of provisional measures, Nicaragua represented to this Court that Nicaragua had adhered to the compulsory jurisdiction of the Permanent Court. This Court will recall that the Nicaraguan letter was in response to a letter from the United States of 23 April 1984. The United States letter pointed to overwhelming and unrebutted evidence that Nicaragua had not adhered to the Optional Clause of the Statute of the Permanent Court because Nicaragua had in fact failed to ratify the Protocol of Signature to that Court's Statute. As the Court recalls, a deposit of an instrument of ratification to that protocol was a mandatory requirement by the very terms of the protocol and yet all the evidence showed that Nicaragua had never made the necessary deposit. The United States requested, on these grounds, that no further proceedings should be conducted on Nicaragua's Application.

The Nicaraguan letter of 24 April, in response, provided the following assurance to this Court: "Nicaragua ratified in due course the Protocol of Signature of the Statute of the Permanent Court." That is what that letter said, Mr. President: "Nicaragua ratified in due course the Protocol of Signature."

During the April oral proceedings, Nicaragua termed the claim in the United States letter of 23 April as "not true" (**I**, p. 43). Nicaragua then provided an additional assurance to the Court:

> "In the present instance, Nicaragua accepted the jurisdiction of the Court without reservations more than 50 years ago, and has always considered itself subject to the compulsory jurisdiction of this Court." (**I**, p. 40.)

But, Mr. President, with the filing of its Memorial of 30 June 1984 Nicaragua no longer stood by the assurances that it gave to the Court in April, but to the contrary from that time forward has flatly contradicted those assurances. It bears recalling that the Court relied on Nicaragua's April assurances in ruling on Nicaragua's request for provisional measures. However, Nicaragua's Memorial of 30 June totally repudiated those prior assurances. In its Memorial (**I**), Nicaragua stated, for example: "Nicaragua never completed ratification of the old Protocol of Signature . . ." (para. 47). Let me repeat that and compare that to what was assured in April: "Nicaragua never completed ratification of the old Protocol of Signature." Mr. President, as if this were not enough, the Memorial of 30 June also stated that Nicaragua's declaration under the Permanent Court system was, and I quote here from a succession of admissions, "inoperative" (para. 31), "insufficient in itself to establish a binding acceptance of compulsory jurisdiction" (para. 47), and not "fully in effect" (para. 27). Continuing, the Memorial stated that the 1929 declaration only "came into force" (para. 72) and only acquired "binding force" in 1945 upon the entry into force of the United Nations Charter (para. 74), a proposition for which the Court will search Nicaragua's Application and oral argument in April in vain for any reference.

This is truly startling, Mr. President. A State has come before this Court, represented a certain state of affairs to the Court for one phase, representations upon which the Court relied, and then has repudiated those representations after the Court has indicated provisional measures and instructed the Parties in the next phase to address the Court's jurisdiction to entertain the dispute and the admissibility of the 9 April Application. To our knowledge, Mr. President, this is an unprecedented abuse of the Court by a party seeking the Court's assistance, and is totally contrary to general principles of international law, and particularly to any conception of due process.

Mr. President, the particular legal issue before the Court in connection with this matter is really quite simple: Has Nicaragua adhered to the compulsory jurisdiction of this Court pursuant to Article 36 of this Court's Statute? The conclusion that Nicaragua has not accepted this Court's compulsory jurisdiction is evident from certain basic equally simple propositions.

First, as noted, Nicaragua specifically admitted in its Memorial of 30 June and contrary to its April assurances, that Nicaragua never ratified the Protocol of Signature under the Permanent Court system. The record in the case, moreover, now demonstrates beyond dispute that Nicaragua deliberately refrained from binding itself to the compulsory jurisdiction of that Court as well as to the compulsory jurisdiction of this Court.

Second, Article 36 (5) of this Court's Statute brought into effect for this Court *only* those declarations under the Permanent Court system that were "still in force" both formally and temporally on the date that the United Nations Charter entered into force. The United States submits that the plain meaning of the phrase "still in force" is "having come into full legal force and remaining in force". That is the only meaning that is consistent with the terms of the Statute of the Permanent Court and its Protocol of Signature and with the terms of the Statute of this Court. The opinions of this Court and the unanimous views of those responsible for Article 36 (5), as well as subsequent independent scholarly opinion, support this conclusion and none other.

Third, the Registry of this Court, in listing Nicaragua since the 1946 *Yearbook* as a State party to the Optional Clause of this Court's Statute but with a cautionary footnote, has never so listed Nicaragua because the Registry believed that Article 36 (5) "perfected its declaration" of 1929 under the Permanent Court system and "gave it binding force" (I, Memorial, para. 178 (E)). The Registry of this Court expressly rejected this possibility beginning with the very first *Yearbook* in 1946. The rejection is apparent from the 1946 cautionary footnote.

Nicaragua appeared in the 1946 listing of the *Yearbook* due to confusion over events subsequent to Nicaragua's 1939 telegram and uncertainty in 1946 in the Registry in The Hague over what might be contained in the Archives of the League of Nations as depositary of the Protocol of Signature in Geneva. The League Archivist authoritatively confirmed in 1955 to the Registry of this Court that Nicaragua had never ratified the Protocol of Signature under the Permanent Court system. On such basis, the Registrar of this Court at the time concluded in a detailed written opinion that it was "impossible" to consider Nicaragua bound to this Court's compulsory jurisdiction under Article 36 (5) as a result of Nicaragua's ratification of the United Nations Charter and its entry into force in October 1945. Since the issue had not been adjudicated by the Court and since the Honduras-Nicaragua boundary dispute was known by the Registrar to be pending at the time, the Registrar, recognizing the diplomatic delicacy of the matter, retained Nicaragua in the *Yearbook* listing, but appropriately amended the cautionary footnote in the *Yearbook* of the following year.

Fourth, all of the other listings of Nicaragua as bound by the compulsory jurisdiction of the Court appear to have relied uncritically on the Registry's *Yearbook* listing or on a comparable misunderstanding of Nicaragua's true status under the Permanent Court of International Justice. None of those listings was based on the theory that Nicaragua first advances in its Memorial with regard to Article 36 (5). The listings are a house of cards built upon this Registry's 1946 *Yearbook*. Remove the *Yearbook*'s listing and replace it with the certainty that, as Nicaragua admits, it never ratified the Protocol of Signature, and the entire edifice collapses.

And *fifth*, in the 55 years since Nicaragua's declaration, and in the 38 years since Nicaragua adhered to the United Nations Charter, no Nicaraguan Government official ever stated before the Memorial of 30 June that Nicaragua had bound itself to the compulsory jurisdiction of the Permanent Court or of this Court. To the contrary, the record is replete with official notices to Nicaragua that it had *not* bound itself to the Permanent Court's optional clause and with evidence that Nicaraguan officials were fully aware of this and yet knowingly chose to do nothing about it. Further, the Government of Nicaragua specifically represented to the United States Government in 1943 that it was not bound to the compulsory jurisdiction of the Permanent Court, and in 1955 and 1956, that it was not bound to the compulsory jurisdiction of this Court.

Mr. President, these are the themes the United States will explore today in its presentation. Many of them are relevant only because Nicaragua has brought them into question or because Nicaragua has confused both the facts and the law. The United States presentation will proceed in four stages.

First, the United States will describe Nicaragua's status with respect to the Permanent Court. Although Nicaragua now freely concedes that it was not subject to that Court's compulsory jurisdiction, it is useful to review this history briefly to set the stage for the real issues to follow.

Second, the United States will demonstrate on the basis of all the materials relevant to interpreting Article 36 (5) of the Court's Statute that this provision cannot and was not intended to mean what Nicaragua asserts for the first time in its Memorial, namely that a State such as Nicaragua, which had deliberately chosen not to bind itself under the mandatory requirements of the old system of compulsory jurisdiction, would be automatically forced, by ratifying the United Nations Charter and the accompanying Statute of this Court, to adhere to the compulsory jurisdiction of this Court.

Third, the United States will demonstrate that there is no place in this Court's law or practice for a theory of compulsory jurisdiction which dispenses with the requirements of this Court's Statute. Nicaragua has referred to this alternative theory as one based on the conduct of the Parties. In reality, it is a theory that contradicts and rejects the very terms of the Statute of this Court.

Fourth and finally, Mr. President, the United States will plead an estoppel against Nicaragua. Having represented to the United States that it was not bound, with the knowledge that the United States would rely on those representations, Nicaragua is estopped from invoking any purported compulsory jurisdiction under this Court's Optional Clause against the United States.

Mr. President, before turning to the details of these four issues, the United States would like first to note the fundamental questions of policy at stake in this matter.

Only those States which have themselves consented under the Optional Clause to be named as respondents have standing to initiate proceedings as applicant. In the words of this Court's Statute, a State must accept "the same obligation" in regard to compulsory jurisdiction as the State it names as respondent

(Art. 36 (2)). Article 36 proceeds directly from the nature of international adjudication. The jurisdiction of international tribunals is an exception to the principle of sovereign immunity and is founded on the consent of sovereign States; unlike municipal law involving private parties, there is no automatic jurisdiction. The premise of jurisdiction by consent is the fundamental principle of, first, reciprocity as among its sovereign participants, and, second, strict equality in their relations to the Court and with each other as nation States.

Nicaragua's failure to consent places it in a position of striking inequality with the United States. Thus, Nicaragua claims the right to sue, but could not be sued itself.

To preserve the integrity of this institution, Nicaragua's application must be dismissed. Because the Court lacks jurisdiction *in limine*, the United States therefore once again raises Nicaragua's lack of consent to the Court's compulsory jurisdiction as a plea in bar of fundamental importance (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 12).

The Court adjourned from 11.20 a.m. to 11.35 a.m.

I will now turn to the pre-Charter status of Nicaragua.

I. NICARAGUA'S PRE-CHARTER STATUS

The United States turns first to the history of Nicaragua's refusal to subject itself to the compulsory jurisdiction of the Permanent Court of International Justice. Strictly speaking, Nicaragua was correct when it stated last week that these events "are only of historical interest" (p. 8, *supra*). As noted, Nicaragua now agrees with the United States that, before the entry into force of the United Nations Charter, Nicaragua never effectively accepted the Permanent Court's compulsory jurisdiction (**I**, Memorial, para. 47).

But the record has a special significance given several of Nicaragua's arguments. The record demonstrates that the refusal to adhere to the Optional Clause through ratification of the Protocol of Signature was a deliberate action by Nicaragua. This refusal was not the result of a technical defect, not an accident, and not due to any loss of documents at sea. Rather, it was Nicaragua's knowing decision not be bound.

First, it bears repeating the legal requirements of the Permanent Court's Optional Clause. States became parties to the Statute of the Permanent Court by ratifying a special Protocol of Signature. Appended to the Protocol, as an integral part of the text, was the Optional Clause. A signature of the Optional Clause without ratification of the Protocol of Signature was without legal effect. As is the case for any optional protocol to a treaty, there could be no undertaking in relation to the optional protocol without participation in the underlying treaty.

The United States mentions this at the outset because, as will be seen, Nicaragua's new Memorial theory, advanced for the first time in that document, relies upon the fiction that the Permanent Court's Optional Clause had an independent life. It did not. It was part of the text of a larger treaty. States which chose not to join the larger treaty by ratifying the Protocol of Signature to the Statute of the Permanent Court did not, in any sense, participate in the Protocol's Optional Clause. This is the view of every expert whose legal opinions are now before this Court Judge Hudson in 1945, the Registrar of this Court, Mr. López-Oliván, in 1955, Professors Rousseau and Bastid, who advised Nicaragua in 1956, and, as will be seen, the senior legal officers of the League of Nations which was the depositary.

The entire history of Nicaragua's failure to join the Statute of the Permanent Court is detailed in the United States Counter-Memorial (**II**) at paragraphs 39-57. For present purposes, it is sufficient simply to highlight that record.

> For the first nine years of the Permanent Court's life, from 1920 to 1929, Nicaragua did not take any act.
>
> In 1929 Nicaragua signed the Optional Clause and it signed the Protocol of Signature.

Remarkably, at the provisional measures phase in April, Nicaragua, as I have indicated, made the statement that "Nicaragua accepted the jurisdiction of the Court without reservations more than 50 years ago" (**I**, p. 40). This was plainly not the case. Nicaragua had not accepted anything in 1929. By failing to ratify the Protocol of Signature, Nicaragua had specifically withheld its consent to the Statute as a whole, and to the Optional Clause in particular. Without the deposit of its instrument of ratification to the Protocol of Signature with the League of Nations, Nicaragua had merely indicated a future possibility that it might legally obligate itself to the Permanent Court's compulsory jurisdiction.

In the succeeding years, Nicaragua was not told once, but at least three times, by the League of Nations that Nicaragua had still to ratify the Protocol of Signature in order to bring Nicaragua's 1929 declaration into force. The letters are at Annexes 12, 23 and 36 of the United States Counter-Memorial (**II**). These letters were from acting legal advisers H. McKinnon Wood in 1934 and in 1939, and Emile Giraud in 1942. Nicaragua never challenged the legal requirements applicable to its declaration.

Next, indeed, the Nicaraguan Foreign Minister reported to the League in 1934

> "As soon as that formality is completed [the formality of internal ratification] I shall have the pleasure of sending the appropriate instruments of ratification to the League of Nations Secretariat." (**II**, Counter-Memorial, Ann. 11.)

Later, after withdrawing from the League of Nations in 1938, Nicaragua sent a telegram in 1939 to the League stating that an "instrument of ratification will be forwarded in due course" (*ibid.*, Ann. 14).

There has been some confusion during these proceedings about the significance of the internal events in Nicaragua which preceded this telegram. Nicaragua has not once, but twice, solemnly assured this Court that Nicaragua completed its domestic process of ratification of the Protocol of Signature in 1935. The United States has no intention of asking the Court to rule on this issue as a matter of Nicaraguan domestic law. Clearly, it is not within the province of this Court to provide an expert judgment on Nicaragua's internal domestic law.

The only relevant question for this proceeding is whether Nicaragua has established a record demonstrating its resolve to subject itself as a matter of legal obligation to the Permanent Court's compulsory jurisdiction. We know it had not consented as an international legal matter, and the League had so advised it.

With respect to Nicaragua's domestic actions, the United States would only point out that Nicaragua has yet to explain how its domestic procedures were allegedly completed.

The customary constitutional practice in Nicaragua undeniably was to publish in writing, in the *Gaceta*, the text of a Presidential decree and the instrument of ratification when Nicaragua wished to adhere to a treaty. The United States Counter-Memorial (**II**) lists a number of such instances at paragraph 48.

Citations to additional instances from the 1935 official *Gaceta* of Nicaragua follow (*La Gaceta*, pp. 628, 820, 836, 917, 995, 1061, 1724/5, 1147, 1260, 1620, 1857, 1973). Nicaragua has not explained why this pattern was not followed with regard to the Protocol of Signature.

Indeed, according to Nicaragua's Foreign Minister in 1943, a Presidential decree was prepared in 1935; it is in Annex 13 to the United States Counter-Memorial (**II**). In English translation, Article 2 of the decree stated: "This law shall enter into force upon publication in the *Gaceta*." This is what the text of the law says: "shall enter into force upon publication in the *Gaceta*." Nicaragua concedes that it was never published in the *Gaceta*. How, then, did it become law for Nicaragua? How, then, did Nicaragua ever indicate any intention to consent, even as an internal matter?

In 1943 Nicaragua's Foreign Minister also told the United States that the instrument of ratification had not yet even been prepared, let alone sent or deposited (**II**, Counter-Memorial, Ann. 13).

This is the record that we have before 1945. We do not know why Nicaragua speculated last week that an instrument may have been prepared, sent, but lost at sea. There is no evidence for that at all. To the contrary, in 1943 the Foreign Minister of Nicaragua told the United States Ambassador that no instrument had even been prepared. Indeed, Nicaragua's own Memorial (**I**) specifically states in Annex 1 thereto that there is no evidence uncovered in Nicaragua that an instrument was ever forwarded to Geneva.

In fact, because of Nicaragua's speculation last week that a *Yearbook* for 1939 might bear some relevance, the United States has confirmed in the past few days with several libraries in the United States that no *Yearbook* or *Memoria* seems ever to have been published for 1939.

The Library of Congress in Washington, however, has just informed us that the President of Nicaragua sent a formal message to the Congress on 15 April 1940, a copy of which is available in the Library of Congress. The President of Nicaragua omitted any mention of the Permanent Court in his detailed description of important administrative acts of government from the opening of the Constitutional Convention on 15 December 1938 through the end of the first year of his constitutional term on 1 April 1940. This omission stands in contrast to the Nicaraguan President's detailed descriptions of the Eighth International Conference of American States, Nicaragua's declaration of neutrality in the war in Europe, a meeting of foreign ministers in Panama, the signing of a treaty with Costa Rica, and even the naming of a special emissary for the Peruvian presidential inauguration. The full title of this report has been provided. ("Mensaje que El Presidente de la Republica General de Division Anastasio Somoza Dirige al Honorable Congreso Nacional al Inaugurase su Periodo de Sesiones Ordinarias el 15 de Abril de 1940.")

This, then, is the historical record before the entry of the United Nations Charter into force in 1945. The record establishes four propositions.

First, as a matter of law under the Protocol of Signature to the Statute of the Permanent Court, Nicaragua did not accept the Permanent Court's compulsory jurisdiction. As Nicaragua puts it in its Memorial, as of the entry into force of the United Nations Charter, "Nicaragua . . . had not completed ratification of the Protocol of Signature of the Permanent Court" (**I**, Memorial, para. 49). The official depositary, the League of Nations, confirmed this in its authoritative Special Supplement of 10 July 1944 (**II**, Counter-Memorial, Ann. 27).

Second, this failure was a deliberate decision by Nicaragua, not a technical oversight or accident. Nicaragua knew the legal requirements of the system, and repeatedly acknowledged them to the League and, in 1943, to the United States.

Moreover, Nicaragua was repeatedly advised that as a result of its failure to ratify the Protocol of Signature it had not bound itself to the Permanent Court's compulsory jurisdiction.

There is no other explanation for Nicaragua's failure to follow its customary procedure for approving international engagements. There is no other explanation for Nicaragua's profession of interest in the Court's jurisdiction and its failure to complete the actions that Nicaragua knew were necessary to alter its ineffective status. There is no other explanation as to why Nicaragua would not even have prepared an instrument of ratification. And there is no other explanation for Nicaragua's failure ever to have published any indication of formal consent to be bound.

The third proposition, Mr. President, follows ineluctably from the preceding two propositions. Nicaragua's delegation to the San Francisco Conference knew that Nicaragua had never subjected itself to the Permanent Court's compulsory jurisdiction. That delegation also knew that this course had been a deliberate decision of national policy for more than 15 years. Nicaragua was represented at the Conference by the same Minister who confirmed to the United States Ambassador in 1943 that Nicaragua was not yet bound. Thus, there can be no doubt on this point.

Fourth and finally, it is apparent why this historical record may have created some confusion internationally. Nicaragua had by telegram to the League in 1939 announced the purported completion of its domestic approval of the Protocol of Signature, but that 1939 telegram by its own words recognized that it remained for Nicaragua to submit its instrument of ratification to bring its 1929 declaration into force. After the end of the war, many incorrectly assumed that Nicaragua had done what its 1939 telegram said it would do, that is, deposit its instrument of ratification. Or at least, as we shall see in discussing the 1946 *Yearbook* of the Court's Registry, it was believed that, because this point was unclear in the absence of authoritative "notification" from the League of Nations archives in Geneva, Nicaragua should figure in listings of compulsory jurisdiction in the absence of notification to the contrary. That explains the last sentence in the footnote in the 1946 *Yearbook* and the change in that last sentence in the 1956 *Yearbook*.

We thus arrive at the conclusion that before the entry into force of the United Nations Charter in 1945, Nicaragua knowingly never took the essential step to give legal life to its declaration of 1929 under the Permanent Court system. Nicaragua never, neither before nor after its withdrawal from the League, deposited, nor it seems intended to deposit, an instrument of ratification with the only authority competent to receive such instrument, namely the Secretary-General of the League of Nations. Nicaragua was advised of its continuing omission as late as 1943 and still Nicaragua did not act. Thus, when Article 36 (5) of the Statute of the present Court was drafted in 1945, Nicaragua knew that it was not among the States already subject to the compulsory jurisdiction of the Permanent Court.

Mr. President, with your permission I now turn to 1945 and the entry into force of the United Nations Charter.

II. 1945 AND THE ENTRY INTO FORCE OF THE UNITED NATIONS CHARTER

We now turn to the new theory of Nicaragua in its Memorial, that the 1929 declaration, which had never been brought into force under the Statute of the Permanent Court as an effective acceptance of that Court's compulsory jurisdiction, nevertheless became a binding acceptance of this Court's compulsory jurisdiction when the United Nations Charter came into force in 1945.

As noted, this new theory was not discussed or even suggested by Nicaragua until its Memorial of 30 June 1984. Indeed, before the Memorial, such a theory had never been publicly espoused at any time in any quarter during the 39 years since the United Nations Charter had entered into force. The United States Counter-Memorial criticized the new theory in depth, and the United States will add to that critique today.

The United States is confident that, at the end of the oral proceedings in this phase of the case, the Court will be convinced that this new Memorial theory is manifestly wrong.

Article 36 (5) of the Statute of this Court is the law that governs this issue. We agree with Nicaraguan counsel that the Court's only task is to discover the true meaning and intent of the text of that provision. The United States contends that the meaning of Article 36 (5) is plain: that is, only declarations that had previously come into force for the Permanent Court and that remained in force when the Charter became effective, are deemed by Article 36 (5) of the Statute of this Court to be acceptances of the compulsory jurisdiction of this Court.

This part of the argument will examine the text of Article 36 (5) as well as evidence of the intention of the draftsmen. The enquiry will be comprehensive in order to show beyond all possible doubt that the entry into force of the Charter for Nicaragua did not subject Nicaragua to the compulsory jurisdiction of this Court under Article 36 (5). The argument will cover the following subjects, in this order:

(1) the text of Article 36 (5);
(2) the principle of continuity;
(3) the negotiating history of Article 36 (5);
(4) the past decisions of this Court;
(5) the opinions of those experts that participated in the San Francisco Conference;
(6) the opinions of publicists;
(7) the *Yearbook* of the Registry of this Court;
(8) other publications;
(9) the views of the United States; and finally,
(10) the views of Nicaragua.

At the outset of this part of the presentation, the United States wishes to stress that the following remarks are directed only at a single, narrow issue — namely, whether Nicaragua's previously ineffective 1929 declaration was, in the words of Nicaragua's Memorial (**I**), "perfected" and given "binding force" (para. 178 (E)) by Nicaragua's ratification and entry into force of the United Nations Charter.

Nicaragua, Mr. President, has systematically attempted to use irrelevant evidence to support its new Memorial theory. We have already noted, for example, that the Registry's first *Yearbook* in 1946 listed Nicaragua on the incorrect assumption that Nicaragua followed up its 1939 telegram by deposit of the instrument of ratification to the Protocol of Signature. Yet Nicaragua now asserts that the 1946 *Yearbook* endorses the theory that the 1929 declaration first entered into force in 1945, not as the result of a deposit under the Protocol of Signature but because of the entry into force of the United Nations Charter. Likewise, Judge Hudson's 1943 and 1946 writings listed Nicaragua on the assumption that Nicaragua's 1929 declaration under the Permanent Court system may have entered into force as a result of the 1939 telegram. Yet Nicaragua asserts that Hudson's publications prove he believed that the declaration first entered into force in 1945. The State Department published a paper compiled by Mr. Dennis Myers in 1948, which listed Nicaragua's declaration as having entered into force in 1939 (**I**, Memorial, para. 44). Yet Nicaragua asserts that this publication shows that the declaration first entered into force in 1945. In brief, Nicaragua has produced no evidence in support of its new theory that the 1929 declaration, ineffective for the Permanent Court, became effective for the first time upon ratification and entry into force of the United Nations Charter. Instead, Nicaragua has demonstrated only that its own conduct in 1939 and thereafter fostered a great deal of confusion and misinformation and indeed is contrary to its new Memorial theory.

(1) The Text of Article 36 (5)

Let us now turn to the text of Article 36 (5). Article 36 (5) states:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The key phrases are "Declarations made . . . and which are still in force" and "for the period which they still have to run".

Counsel for Nicaragua asserted last week that the phrase "*Declarations* made under Article 36 of the Statute of the Permanent Court" was "the grammatical subject and the semantic focus" of the Article (p. 15, *supra*). He would thus ignore the very phrase that contradicts him. In fact, Article 36 (5) is about "Declarations made . . . and which are still in force". In other words, Article 36 (5) is about binding legal commitments whose duration has not ended.

The United States believes that declarations "in force" under the Statute of the Permanent Court can only be declarations that bound the declarant State to accept the compulsory jurisdiction of the Permanent Court. That is what the terms of the Protocol of Signature are all about. Nicaragua contends that a declaration that created no legal obligations and which therefore did not bind the declarant to accept the jurisdiction of the Permanent Court in accordance with the mandatory requirements of the Protocol of Signature was nevertheless considered to be "still in force" within the meaning of Article 36 (5) when the Charter of the United Nations became effective.

Nicaragua's theory immediately confronts an obvious problem. The words "in force" have a standard legal meaning. A treaty is "in force" or "in effect" if it is binding. A treaty which is not binding upon a State is not "in force" for that State. We shall quote only Sir Humphrey Waldock, in his role as Special Rapporteur of the International Law Commission on the Law of Treaties. His discussion of the Law of Treaties noted "the basic rule that the entry into force of the treaty automatically makes it binding upon the parties" (*Yearbook of the International Law Commission 1962*, Vol. II, para. 27, p. 71). The United States Counter-Memorial (**II**) cites other authorities that define "in force" to mean "binding" (para. 60, note 1, and para. 61). Nicaragua has ignored these authorities. Indeed, even Nicaraguan counsel has not dared to suggest that this is not the normal, everyday meaning of the phrase "in force".

Under the system of the League, the mere signing of a declaration did not constitute acceptance of the compulsory jurisdiction of the Permanent Court. A declaration under the Optional Clause was not an independent legal instrument. The Optional Clause was an integral part of the Protocol of Signature. The declaration could not be "in force" unless the declarant was party to the Protocol of Signature.

Counsel for Nicaragua asks, if Article 36 (5) only includes declarations by parties to the Protocol of Signature, why did the drafters not say so? (P. 14, *supra.*) The simple answer is that the drafters did say so. The common, ordinary, plain meaning of the words "in force" have this effect. The Counter-Memorial (**II**) quoted a passage from Judge Hudson's 1942 text entitled "Entry into force of declarations" (para. 61). Since Nicaragua has not referred to this passage, permit me to quote one sentence:

> "A declaration which does not expressly require ratification may enter into force at the time of signature if the declarant simultaneously deposits or has previously deposited a ratification of the Protocol of Signature; otherwise such a declaration will not enter into force until a ratification of the Protocol of Signature is deposited."

In short, "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force" can only apply to declarations that had bound the declarant to accept the compulsory jurisdiction of the Permanent Court.

Mr. President, the phrasing of the French text is slightly different. Whereas the English text uses the phrases "made . . . and which are still in force" and "for the period which they still have to run" in limiting the class of affected declarations, the French text speaks of declarations "*faites . . . pour une durée qui n'est pas encore expirée*" and "*pour la durée restant à courir d'après ces déclarations*". Translated literally into English the initial French phrase becomes "made . . . for a duration which has not yet expired".

The United States Counter-Memorial (**II**) explained why this French text parallels the English (paras. 67-71). Both apply to declarations that had entered into force, that is, which bound the declarants to recognize as compulsory the jurisdiction of the Permanent Court, and that were still in force when the Charter entered into force.

Nicaragua contends the French text applies to declarations whose time period has not expired whether or not the declaration ever entered into force. Nicaragua's interpretation is wrong for a number of reasons. The first reason is that, even viewed in total isolation, the French text cannot sensibly be read to apply to declarations which had never entered into force. A declaration cannot be made "for a period which still has to run" and be preserved for that remaining term unless it has first come to life.

The Counter-Memorial of the United States (**II**) at paragraph 61 used the related concepts of formal validity and temporal validity described by Sir Gerald Fitzmaurice for the International Law Commission to elucidate this point.

A treaty has *formal* validity if it has entered into force; it has *temporal* validity, that is, duration, if its period of formal validity has not expired. For the period of validity to end, it must have begun, and it may not begin until an instrument has been brought into force. Against this background, it can be seen that the French text's reference to declarations made for a period which has not expired only referred to declarations already once in force. This is confirmed by the legislative history of the provision, which will be addressed in a few moments.

But whether or not the French text can be read in other ways in isolation, it is clear it must be read this way when put side by side with the other authentic texts of the Statute.

Under Article 33 of the Vienna Convention, the terms of treaties authenticated in two or more languages are presumed to have the same meaning in each text.

The English phrase "still in force" is absolutely incapable of being applied to declarations that never became binding. The Russian, Chinese and Spanish texts use the same formulation as the English. These texts are equally authentic with the English and the French. In order for all the texts to be consistent, the French text must be interpreted, in accordance with its natural meaning, to apply only to declarations which had previously entered into force and still had a period to run.

One further point needs to be emphasized. Article 36 (5) only applies to declarations which were in force *under the Statute of the Permanent Court*. The function of Article 36 (5) is simply to transfer the pre-existing compulsory jurisdiction of the Permanent Court to the International Court. But Nicaragua's new theory as first advanced in its Memorial is altogether different. Nicaragua argues that the present Statute carried over Nicaragua's ineffective 1929 declaration from the old Court to the new Court and that ratification of the new Statute "gave it binding force". (See p. 19, *supra*; I, Memorial, para. 48 (F).) Nicaragua's position in effect is that ratification of either Statute could give the 1929 declaration binding force. But this cannot be, Mr. President. The 1929 declaration was made under the Statute of the Permanent Court and attached to its Protocol of Signature. Ratification of an entirely separate treaty could in no way bring into force any obligations under the Protocol of Signature. Article 36 (5) certainly does not purport to amend the Protocol of Signature. And Nicaragua's declaration never entered into force under the Statute of the Permanent Court, neither before nor after ratification of the United Nations Charter.

To sum up what has been said so far about the plain meaning of the text, Article 36 (5) applies only to declarations which had previously bound the declarant to accept the compulsory jurisdiction of the Permanent Court at the time the Charter came into force. Article 36 (5) does not apply to declarations which had never before that time entered into force for the Permanent Court.

(2) *Principle of Continuity*

We turn now, Mr. President, to the second subject, the principle of continuity. It is our belief that the internal logic of Article 36 (5) reinforces the plain meaning of the text. As Nicaragua correctly states, Article 36 (5) sought to establish continuity between the jurisdiction of the old Court and the jurisdiction of the new Court (pp. 17-18, *supra*). This is apparent not only from the negotiating history, which will be discussed later, but from the text itself. Let us consider how Article 36 (5) operates with respect to the following categories of States:

> One, only States whose declarations were in force for the old Court at the time of the entry into force of the Charter were deemed to have accepted the compulsory jurisdiction of the new Court.
>
> Two, of the declarations then in force, those that were subject to time-limits remained subject to the same time-limits.
>
> Three, of the declarations then in force, those that were subject to conditions remained subject to the same conditions.
>
> Four, States which had not made obligatory and effective declarations under the old Court were not deemed to have accepted the compulsory jurisdiction of the new Court.
>
> Five, likewise, States whose declarations were not in force for the old Court at the time of the entry into force of the Charter were not deemed to have accepted the compulsory jurisdiction of the new Court.

For example, States whose declarations under the old Court had been in force but had previously expired were not deemed to have accepted the compulsory jurisdiction of the new Court.

Six, and States whose declarations under the old Court were themselves subject to ratification but had not been ratified were not deemed to have accepted the compulsory jurisdiction of the new Court despite the prior ratification of the Protocol of Signature.

In each instance, the extent of a State's obligations with respect to the compulsory jurisdiction of the old Court remained unchanged, except that the International Court was substituted for the Permanent Court. As this Court stated in *Aerial Incident*, Article 36 (5) "Maintains an existing obligation while changing its subject-matter" (*Aerial Incident, Preliminary Objections, I.C.J. Reports 1959*, p. 138).

This concern for continuity is not accidental. It is based upon the fundamental principle that the consent of a State to accept jurisdiction must be manifest and may not be presumed. Under the rule of continuity contained in Article 36 (5), each State is deemed to have accepted the compulsory jurisdiction of the new Court only to the extent that it had manifested its consent to accept the compulsory jurisdiction of the old Court.

With these thoughts in mind, let us consider Nicaragua's key contention. Counsel for Nicaragua stated last week:

> "To carry forward Nicaragua's unexpired declaration would not change the existing situation or expand the pre-existing jurisdiction. On the contrary, Nicaragua was in exactly the same situation under the new Statute, as drafted, as it was under the old. In either case, ratification of the Statute of the Court would perfect its declaration." (P. 19, *supra*.)

But this statement, Mr. President, begs the question. The question is not whether Nicaragua's position remains the same if ratification of the new Statute is substituted for ratification of the Protocol of Signature. The question is whether Article 36 (5) of the new Statute dispenses with the need for a deposit of a new declaration under Article 36 (4) in a case where a declaration signed under the régime of the old Court was never brought into force and made obligatory by the mandatory requirements of the deposit of a ratification of the Protocol of Signature. Nicaragua's new Memorial theory would attribute binding effect to an act that was never binding under the régime under which attribution was to be made.

Furthermore, Nicaragua's new theory violates the principle of continuity that is the basis of Article 36 (5). To carry forward Nicaragua's ineffective 1929 declaration most emphatically would not place Nicaragua in the same situation under the new Statute as it was under the old. Under the old Statute, Nicaragua was not subject to the Permanent Court's jurisdiction. But under the new Statute — according to Nicaragua's new theory — Nicaragua is subject to this Court's jurisdiction, not because of a new declaration under Article 36 (4) but because of the old 1929 declaration that had never come into force for the Permanent Court. To bring into effect a declaration for the new Statute which had never been in effect for the old Statute would be, and I quote counsel for Nicaragua: "Not to *continue* the existing situation, but to change it, not to preserve jurisdiction but to expand it" (p. 18, *supra*).

For ratification of the Charter to impose a new legal obligation on Nicaragua where none had existed before would violate the principle of continuity and thereby the logic and purpose of Article 36 (5).

The Court may wish to recall its discussion in the *Aerial Incident* case:

> "If Bulgaria, which at the time of its admission to the United Nations was under no obligation of that kind in consequence of the lapse of its Declaration of 1921, were to be regarded as subject to the compulsory jurisdiction as a result of its admission to the United Nations, the Statute of the Court would, in the case of Bulgaria, have a legal consequence, namely, compulsory jurisdiction, which that Statute does not impose upon other States. It is difficult to accept an interpretation which would constitute in the case of Bulgaria such a derogation from the system of the Statute." (*I.C.J. Reports 1959*, p. 145.)

Bulgaria at least had ratified the Protocol of Signature in 1921 and had thus been obligated by the compulsory jurisdiction of the Permanent Court during the lifetime of that Court. Under the rationale of *Aerial Incident*, it would be even more difficult to accept that admission to the United Nations would impose compulsory jurisdiction on a State that had *never* accepted such jurisdiction under the old system by ratifying the Protocol of Signature.

Nicaragua's new theory also violates the principle that consent to accept jurisdiction must be manifest and cannot be presumed. Again, recall the statement of Nicaragua's counsel last week with respect to those States which had accepted the jurisdiction of the Permanent Court, but whose acceptances had expired: "it could by no means be assumed that the declarants of the expired declarations, even if represented at the Conference, would consent to their resurrection" (p. 18, *supra*). *A fortiori*, by no means could it be assumed that States which had *never* accepted the compulsory jurisdiction of the Permanent Court nevertheless consented to the compulsory jurisdiction of the International Court simply by adhering to the Statute of this Court.

The unstated presumption in Nicaragua's new theory is that by signing the Optional Clause in 1929, Nicaragua had in some sense consented to the compulsory jurisdiction of the Permanent Court and had withheld only its consent to the Statute of the Permanent Court. But that is nonsense. The Optional Clause to which the declaration pertained was not a separate instrument; it was part and parcel of the Protocol of Signature. A State could not consent to the compulsory jurisdiction of that Court if it withheld its consent by failing to ratify that Protocol to the Court's Statute. The one — the Optional Clause — was entirely subordinate to the other — the Court's Statute and its Protocol of Signature.

Nicaragua has argued that it manifested the necessary consent to accept the Court's compulsory jurisdiction when it ratified the Charter and the Statute, of which Article 36 (5) was a part. But, Mr. President, the exact opposite is true. The language, the logic, and the negotiating history of Article 36 (5) show that the Article carried over existing jurisdiction, but did not create new jurisdiction. By ratifying the Statute of which Article 36 (5) was part, Nicaragua agreed that declarations not in force for the Permanent Court, including its own, would not be carried over. Nicaraguan ratification of the Charter no more manifested consent to compulsory jurisdiction than, for example, United States ratification of the Charter manifested its consent to compulsory jurisdiction.

To sum up this part of the discussion: Nicaragua's new Memorial theory that ratification and entry into force of the Charter could bring its ineffective 1929 declaration into force for the first time is directly contrary to the logic of continuity of Article 36 (5). If the drafters were concerned that the duration of a declaration not be extended; if they were concerned not to resurrect a declaration that had expired; and if they were concerned that any declaration remain subject to the same conditions, then we submit that it is absurd to suggest that the drafters intended to bring into effect a declaration which had previously been forever ineffective.

In short, Article 36 (5) did not create a new jurisdiction where none had existed before.

(3) Negotiating History

With your permission, Mr. President, we now move to review the third subject, the negotiating history of Article 36 (5). That history confirms that Article 36 (5) was intended only to preserve and not to expand the compulsory jurisdiction of the Permanent Court.

The Washington Committee of Jurists, which met shortly before the San Francisco conference, was the first to consider in detail the transfer of jurisdiction from the Permanent Court to the new Court which was to be created. At the meeting, the United Kingdom asked what should be done with the existing acceptances of compulsory jurisdiction. In comments submitted to the Committee, the United Kingdom stated:

> "One question which will arise in connection with Article 36, is what action should be taken concerning the existing acceptances of the 'Optional Clause', by which a number of countries have, subject to certain reservations, *bound themselves to accept the jurisdiction of the Court as obligatory*. Should these acceptances be regarded as having automatically come to an end or should provision be made for continuing them in force with perhaps a provision by which those concerned could revise or denounce them." (14 *UNCIO* 318 (Jurist 14); emphasis added.)

Thus, the United Kingdom was concerned only with the continuity of declarations in force, that is, declarations in force binding the declarant "to accept the jurisdiction of the [Permanent] Court as obligatory".

The next mention of the problem at the Washington Committee of Jurists comes in the report of the Subcommittee formed to draft language for a continuation of the Optional Clause. The report stated:

> "The Subcommittee calls attention to the fact that many nations have heretofore accepted the compulsory jurisdiction under the 'Optional Clause'. The Subcommittee believes that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances *in force* for the purpose of this Statute." (14 *UNCIO* 288-289 (Jurist 41); emphasis added.)

Thus the Subcommittee, like the United Kingdom, was concerned only with declarations in force, that is, only with binding acceptances of the compulsory jurisdiction of the Permanent Court.

Finally, the full Washington Committee of Jurists referred to the problem of existing acceptances in its report summarizing its recommendations to the San Francisco Conference. The report was written by the Committee's Rapporteur, Jules Basdevant, later a distinguished Member of this Court:

> "It should be observed . . . that if the Court which will be governed by the present Statute is considered as a continuation of the Court instituted in 1920, *the force of law* of the numerous general or special international acts affirming the compulsory jurisdiction of this Court will subsist. If, on the contrary, the Court is to be a new Court, the former one disappearing, it could be argued that the *said obligations* will run the risk of being considered null and void, their restoration in force will not be easy, and an

> advance in law will thus be abandoned or seriously endangered." (14 *UNCIO* 821, 843 (Jurist 86); emphasis added.)

Thus the concern of the Washington Committee of Jurists was only to maintain obligations which were already in force.

The United Nations conference in San Francisco likewise wished only to preserve effective acceptances of the Permanent Court's jurisdiction. Commission IV of the Conference had responsibility for legal matters. Commission IV appointed a Committee, Committee 1, to continue the process of drafting the Court's Statute. Once again, the United Kingdom raised the issue of the continuity of the Permanent Court's compulsory jurisdiction. On 28 May 1945 the United Kingdom representative stated:

> "If the Committee decides to retain the optional clause, it could provide for the *continuing validity of existing adherences* to it." (*UNCIO*, Vol. 27, doc. 661, Summary Report of Fourteenth Meeting of Committee IV/1, p. 4; emphasis added.)

At the same session, Committee 1 established a special Subcommittee D to discuss the choice between optional and compulsory jurisdiction. This Subcommittee prepared the first draft of what ultimately became Article 36 (5) of the present Statute of the Court. That draft reads as follows:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute to have been made under this Article and shall continue to apply, in accordance with their terms."

The French version applied to "déclarations encore en vigueur". Both the English and French texts may be found in Annex 30 of the United States Counter-Memorial (**II**). By the plain terms of the text, and in the light of the prior negotiating history, the Subcommittee intended only to maintain the existing compulsory jurisdiction. The proposal applied only to declarations "in force" or "en vigueur" — terms universally understood to mean "in effect" or "binding". Moreover, no delegation had suggested that declarations not in force should be brought into force by the Statute. Indeed, such a suggestion would have been contrary to the decision to retain the Optional Clause rather than to institute compulsory jurisdiction.

On 1 June 1945, Committee 1 approved Subcommittee D's recommendation to retain optional jurisdiction and to carry over only those declarations already in force for the Permanent Court. Four days later, the French delegation proposed several changes to the text of Article 36 as it had been adopted. The English text of the French proposal retained the phrase "still in force". The French text was revised to use the phrase "pour une durée qui n'est pas encore expirée". The French representative expressed quite clearly the intent of the changes. According to the Committee's report, he "stated that the changes suggested by him . . . were not substantive ones, but were intended to improve the phraseology" (**II**, Counter-Memorial, Ann. 31). It is clear that the French delegate and the Committee both intended the French text to have the same meaning as the English text and this was to carry over only declarations already subjecting a State to the Permanent Court's compulsory jurisdiction and "for the period which they still have to run". Again, an obligation cannot expire or run out unless there was previously a creation of that obligation.

Counsel for Nicaragua has asserted that "there is no doubt that the English text was supposed to mean the same thing as the French" (p. 15, *supra*). But as the negotiating history shows, the exact opposite is true. There is no doubt that the French text is supposed to mean the same as the English.

This Court has already decided the question presented by Nicaragua's new Memorial theory. Indeed, if your predecessors who participated in the *Aerial Incident* case were to vote in this case in accordance with their past opinions, they would vote unanimously to reject Nicaragua's new theory (*Aerial Incident of 27 July 1955, Judgment, I.C.J. Reports 1959*, p. 127).

The United States Counter-Memorial (**II**) discussed the *Aerial Incident* at paragraphs 95 to 102. Counsel for Nicaragua completely ignored that discussion and, moreover, largely ignored the pertinent content of the majority and joint dissenting opinions. Above all, counsel for Nicaragua ignored the common understanding of everyone involved in that case that the Bulgarian declaration had been brought into force for the Permanent Court and continued to bind Bulgaria to accept the compulsory jurisdiction of the Permanent Court when the Charter entered into force.

The majority and the dissenters agreed that Article 36 (5) applied only to States which previously had effectively accepted the compulsory jurisdiction of the Permanent Court. In other words, the majority and the dissent agreed that under Article 36 (5) "Declarations . . . still in force" referred exclusively to declarations that had previously bound the declarant to accept the compulsory jurisdiction of the Permanent Court and that remained in force when the Charter entered into effect. According to their opinions, Article 36 (5) did not and could not apply to a State such as Nicaragua that had never accepted the jurisdiction of the Permanent Court.

Counsel for Nicaragua made this astonishing statement last Monday:

> "Nothing in the [majority] opinion, either in holding or in considered *obiter dictum*, excludes or is even faintly inconsistent with the position here taken by Nicaragua." (P-21, *supra*.)

That assertion may be measured against the words of the Court.

There is one final excerpt of interest from the negotiating history. On 22 June, Mr. Evatt of Australia made a statement on behalf of his country before Commission IV. He discussed the effect of Article 36 (5) as follows:

> "Now, at one time or another 45 States exercised their options to make declarations under the old Statute. Not all of these States are members of the United Nations, and by no means all the declarations are still in force. *I remind the Commission also that 13 Members of the United Nations were not parties to the old Statute*. It appears the declarations under the old Statute, by about 20 States, will, by virtue of the provisions of the new Statute, be made applicable to the new Court." (*UNCIO*, Vol. 13, doc. 1007, Minutes of Second Meeting of Commission IV (15 June 1945), p. 11 (emphasis added).)

This passage reveals Australia's understanding that Article 36 (5) would not apply, first, to States not parties to the United Nations Charter and, second, to States whose previously effective declarations had expired, and, third, and of most significance here, to States that were not party to the Statute of the old Court. Mr. Evatt confirmed again in the same statement that the extent of the compulsory jurisdiction of the new Court "will depend on the willingness of those 13 Members to make declarations under Article 36 of the new Statute". That is, new declarations deposited under Article 36 (4) of this Court's Statute (*ibid.*). In short, the negotiating history in both Washington and San Francisco confirms the plain meaning of the text: Article 36 (5) was intended only to carry over declarations that had previously bound the declarant to accept the compulsory jurisdiction of the Permanent Court and that remained in force as of the date of entry into force of the United Nations Charter.

(4) The Past Decisions of the Court

We move now to the fourth category of evidence confirming the United States view of Article 36 (5): the jurisprudence of this Court.

Again and again the Judgment explains that Article 36 (5) applies only to effective acceptances of the Permanent Court's jurisdiction. See for example at page 138: Article 36 (5): "maintained an existing obligation"; at page 143: Article 36 (5) effected "the transfer to the new Court of the compulsory jurisdiction of the old"; and at page 145: the clear intention which inspired Article 36 (5) is "to preserve existing acceptances". These are not *dicta*. The Judgment is built upon the premise that Article 36 (5) only applied to actual acceptances of the old Court's jurisdiction.

Counsel for Nicaragua also implied last week that in the dissent's opinion in *Aerial Incident* "there is not a word in it about the declarant State being 'bound' to accept the compulsory jurisdiction of the Permanent Court" (p. 22, *supra*). This statement is equally astonishing and incorrect. The dissent stated repeatedly that the purpose of Article 36 (5) was to preserve the compulsory jurisdiction that had been conferred upon the Permanent Court. For example, page 168 of the joint dissent states that:

> "The governing principle underlying paragraph 5 is that of automatic succession of the International Court of Justice in respect of the engagements undertaken by reference to the Statute of the Permanent Court, the dissolution of which was clearly envisaged and anticipated . . ." (*I.C.J. Reports 1959*, p. 168.)

Elsewhere, the dissent states that:

> "the authors of paragraph 5 had in mind the maintenance of the entire group of declarations of acceptance which were still in force and in accordance with their terms, irrespective of the dissolution of the Permanent Court" (*ibid.*, p. 150).

And what could be clearer than the following statement, which Nicaragua itself included in its Memorial (**I**, para. 14). I quote from the dissent:

> "This was the purpose of paragraph 5. They said in effect: Whatever legal obstacles there may be, these declarations, provided that their period of validity has not expired — that is provided that they are still in force on the day of the entry of the Charter into force or on the day on which the declarant State becomes a party to the Statute — shall continue in respect of the International Court of Justice." (*I.C.J. Reports 1959*, pp. 167-168.)

There, Mr. President, you have it in a nutshell. Those declarations that "are still in force on the day of the entry of the Charter into force" fall within Article 36 (5). (See also **II**, United States Counter-Memorial, paras. 75-77, and note 1 containing cites to other pertinent passages.)

As counsel for Nicaragua said last Monday (p. 14, *supra*): "One is tempted to say Q.E.D. and sit down at this point." But there is so much more to discuss.

The majority and the dissent agreed that "declarations . . . in force" included only effective acceptances of the Permanent Court's jurisdiction. They disagreed about the events that might render a declaration no longer in force.

The majority believed that a declaration was no longer in force when the object of the declaration, the Permanent Court, disappeared. The dissent believed that the words "still in force" excluded only those declarations that had come into force and whose duration had expired and had nothing to do with the dissolution of the Permanent Court (*I.C.J. Reports 1959*, pp. 162 f.).

In effect, the majority and the dissent agreed on the requirement of formal validity; they disagreed only as to the circumstances that might affect the continuance of temporal validity. Nicaragua can find no comfort in the Judgment, in the joint dissent, or in the separate opinions of Judges Zafrulla Khan, Badawi, or Armand-Ugon (*I.C.J. Reports 1959*, pp. 146, 148, 153). In fact, all the Judges were agreed: Article 36 (5) did not apply to declarations lacking formal validity.

Nicaragua asserted incorrectly in the oral proceedings of last week that its theory in this case is identical to the theory advanced by the United States in its 1960 observations in the *Aerial Incident* case. The position advanced by the United States in that case was in fact identical with the theory of the joint dissent which was made public a few months before. This may be confirmed by a comparison of pages 319 to 320 of the observations (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*) with pages 161 to 162 of the joint dissenting opinion (*I.C.J. Reports 1959*).

Like the joint dissent, the United States believed that Article 36 (5) only carried over actual acceptances of the compulsory jurisdiction of the Permanent Court that were in force as of 24 October 1945. It should be emphasized again that the premise of the case was that Bulgaria had ratified the Protocol of Signature in 1921 and was thus from then on bound by its declaration to accept the compulsory jurisdiction of the Permanent Court. Counsel for Nicaragua last week conveniently overlooked the fact that Bulgaria ratified the Protocol of Signature whereas Nicaragua by its own admission never did. Like the joint dissent, the United States believed in 1960 that "declarations . . . still in force" applied only to Permanent Court declarations that had actually been in effect for the Permanent Court. This is confirmed by the United States analysis of Bulgaria's declaration, at page 312 of the observations (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*).

Bulgaria signed the Protocol of Signature on 21 April 1921. Bulgaria signed the Optional Clause on 29 July 1921. Bulgaria on that date was in the same position as Nicaragua was from 1929 forward: that is, Bulgaria had a declaration under the Optional Clause of the Statute and had signed but not ratified the Protocol of Signature.

However, as noted, the Bulgarian declaration of 21 April 1921 "was ratified and came into force on August 12, 1921 . . . Bulgaria's acceptance of compulsory jurisdiction was without limit of time. It was to remain in force indefinitely" (*ibid.*, p. 312).

Counsel for Nicaragua asserted in oral argument last week that the United States argument in the *Aerial Incident* case could well be adopted by Nicaragua "as a fair statement of its own" (p. 15, *supra*). But counsel omitted the critical fact that whereas Nicaragua never ratified the Protocol of Signature, Bulgaria did so promptly in 1921. Thus Bulgaria's declaration did become effective for the Permanent Court and was still in effect at the time the Charter entered into force. This was essential for the application of Article 36 (5). As the United States 1960 observations stated:

> "In considering the proper interpretation and application of Article 36, paragraph 5, of the Statute, it may be helpful to consider the situation of certain States other than Bulgaria whose acceptances of the compulsory

> jurisdiction of the Permanent Court of International Justice were still in force at the time of the establishment of the United Nations and which did not become Members of the United Nations until later, if at all." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 315.)

Had Bulgaria's declaration not been effective for the Permanent Court at the time that the Charter entered into force, the joint dissent and the United States could not have constructed any plausible argument that Bulgaria's declaration was subject to Article 36 (5).

Thus, the United States position, then as now, was that Article 36 (5) applies only to declarations that were valid and binding as of 24 October 1945. In particular, a declaration had no formal validity — it was ineffective — unless and until the declarant became a party to the Protocol of Signature.

The United States pleadings in the *Aerial Incident* case agreed with the joint dissent that the words "still in force" excluded only those declarations that had come into force and whose duration had expired, whereas the majority of the Court believed that a declaration terminated when the Permanent Court came to an end. But the United States observations, like the joint dissent, provide no support for Nicaragua's theory that Article 36 (5) applied to declarations which had previously never come into force for the Permanent Court.

To paraphrase counsel for Nicaragua last week, but only with regard to Nicaragua's new theory (p. 16, *supra*): the point thus remains that the interpretation of Article 36 (5) for which the United States contends — not Nicaragua but the United States — is the very position taken by the United States when it last addressed the issue in this forum in 1960.

Mr. President, Nicaragua also asserted last week that *Barcelona Traction* may be regarded as reversing the *Aerial Incident* Judgment (p. 22, *supra*). That statement is incorrect, for Article 37, with which *Barcelona Traction* was concerned, is different from Article 36 (5). This point is discussed in the United States Counter-Memorial (**II**, paras. 109-112).

Of greater importance to this case is that the Court in *Barcelona Traction* confirmed in its holding that Article 37, like Article 36 (5), was intended only to preserve jurisdiction in effect for the Permanent Court and not to create any new obligatory jurisdiction that had not existed before that dissolution (*Barcelona Traction Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 4, 35).

On this point, the Court's interpretation of Article 37 is consistent with the majority and the dissent in *Aerial Incident* regarding Article 36 (5): that is, neither Article 36 (5) nor Article 37 is intended to create any new obligatory jurisdiction that had not previously existed for the Permanent Court at the time of the entry into force of the United Nations Charter.

Nicaragua last week quoted Judge Tanaka's separate opinion (p. 23, *supra*). True, Judge Tanaka agreed with the dissent rather than with the majority in *Aerial Incident*. But Nicaragua can seek no help from Judge Tanaka. Judge Tanaka thought that both Article 36 (5) and Article 37 had the same essential purpose: "the continuity of the acceptance of compulsory jurisdiction" (*I.C.J. Reports 1964*, p. 71). Concerning Article 36 in particular, he states:

> "Nobody can deny that the purpose of this provision is the preservation of the effect of compulsory jurisdiction accepted in regard to the old Court under the régime of the new Court." (*Ibid.*, p. 72.)

Judge Tanaka explicitly rejected the notion that Article 36 (5) might be interpreted to create new obligations on its own. He stated:

> "From what is indicated above, I may conclude that Article 36, paragraph 5, simply affirms the true and reasonable intention of declarant States and does not impose any new obligations upon them." (*I.C.J. Reports 1964*, p. 73.)

The dissenting opinions of Judges Morelli and Armand-Ugon also emphasized the notion of continuity of obligations. For example, Judge Armand-Ugon stated that "Article 36, paragraph 5, concerns . . . the obligation to accept jurisdiction on the basis of the pre-existing treaty, the Statute" (*ibid.*, p. 146).

In short, the entire Court in *Barcelona Traction* rejected the notion that Article 37 might create jurisdictional obligations where none existed before. And Judge Tanaka, upon whom Nicaragua specifically relies, rejected the notion that Article 36 (5) might impose new obligations. Thus, not only *Aerial Incident* but also *Barcelona Traction* rejects the premise of Nicaragua's new Memorial theory.

(5) The Opinions of Participants at the San Francisco Conference

We turn now to the fifth subject, the opinions of the participants in the San Francisco Conference. Those who attended the Conference were the élite diplomats and international lawyers of their nations. In the months and years after the Conference, they published their interpretations of the Charter and the Statute in books and articles, in delegation reports and legislative testimony, and in their opinions as Judges of this Court. Their views of Article 36 (5) confirm what is apparent from the text and from the negotiating history, that is that Article 36 (5) preserved, as far as possible, the compulsory jurisdiction of the Permanent Court existing on the day the Charter entered into force. To the knowledge of the United States, no one from the Conference ever suggested that Article 36 (5) might be interpreted to create obligations for States under the Optional Clause of the present Court where none had existed before.

The opinions of those at the Conference carry special weight. These men were familiar not only with the written materials we have today in the records of the Conference, they were also party to the confidential discussions, the strategy sessions and the drafting committees. These are the people who would have known what was intended by the phrase "still in force".

Let me begin with Green Hackworth, not because he was an American and a distinguished Judge of this Court, but because he was the Chairman of the Washington Committee of Jurists, as well as a key participant in Committee IV/1 at San Francisco. He was present when the British first presented the problem of existing adherence to the Optional Clause and he was there when the Statute was finally approved. He appeared for the State Department before the Senate Foreign Relations Committee, when the Charter and Statute of the Court were submitted to the Senate for its advice and consent. He explained to them that Article 36 (5) was intended to address the concern that:

> "States that had accepted compulsory jurisdiction under the [Permanent] Court would no longer be bound by their acceptance if a new Court were set up. That was taken care of by a provision in the Statute in Article 36, that those States which had accepted compulsory jurisdiction for the Permanent Court of International Justice would now substitute the proposed International Court under the same terms." (*Report to the President of the United States*, p. 338.)

Note the language used — States "bound by their acceptance" of the compulsory jurisdiction for the Permanent Court. This was of substantial importance to the

United States Senate. It was the Senate which for many years had stood in the way of United States adherence to the Permanent Court's compulsory jurisdiction. Had Article 36 (5) been intended to enlarge the field of compulsory jurisdiction, Judge Hackworth surely would have mentioned this effect. He did not.

Philip Jessup also had occasion to address the significance of Article 36 (5). He attended the San Francisco Conference as an expert on judicial organization and later was a distinguished Member of this Court. In the *South West Africa* cases (*Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, separate opinion, at p. 415), he made quite clear his view that Nicaragua's new Memorial theory was impossible:

> "It was clearly the intention in the drafting of the Statute of the International Court of Justice to preserve for the new Court just as much as possible of the jurisdiction which appertained to the old Court. For this purpose, Article 36 (5) provided for the transfer of the obligations assumed by States which made declarations under Article 36 of the old Statute . . ."

Once again, I draw the Court's attention to his words: paragraph 5 was to "preserve . . . obligations". There is no question of expanding jurisdiction or of creating obligations where none had existed before.

A third distinguished American legal figure at the Conference was Charles Fahy. Mr. Fahy was Solicitor General of the United States at the time, one of the highest ranking officials of our Department of Justice, and the individual responsible for representing the United States in the United States Supreme Court. He later became Legal Adviser to the Department of State, and in 1946 he testified on behalf of the Truman Administration before the Senate Foreign Relations Committee. The purpose of these hearings was to determine whether the Senate should approve a proposed United States declaration accepting the Court's compulsory jurisdiction. Mr. Fahy described Article 36 (5) in the following fashion:

> "A group of declarations are already in force by virtue of Article 36, paragraph 5, of the Statute which provides that declarations made under the corresponding article of the Statute of the Permanent Court of International Justice and still in force, shall be deemed, as among the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the new Court for such periods as they still have to run." (*Department of State Bulletin*, 28 July 1946, p. 159.)

Mr. Fahy then listed 19 States which fell within this category. Nicaragua was not among the States listed (*ibid.*).

In a few moments, the United States would like to review this list that Mr. Fahy prepared. For the present, let me highlight its special significance, since Nicaragua has suggested it carried no weight.

The list of States subject to Article 36 (5) was presented to the Senate in a special context. The Senate wanted to know, as it considered approving a declaration, which States had undertaken a similar obligation. They were interested, in short, in the problem of reciprocity — to whom would the United States be exposing itself to suit and vice versa. Mr. Fahy's list was provided for this very purpose. As we will describe in a moment, it was not an ill-considered list, nor one based solely on the last publications of the League of Nations. It was perhaps the most accurate analysis ever done of the application of Article 36 (5). This was not an academic exercise, nor was it a vague or general account for a disinterested committee. It was very much on the basis of Mr. Fahy's list and account of how Article 36 (5) worked that the Senate approved the 1946 United States declaration. In so doing, the Senate adopted Mr. Fahy's analysis and his listing of 19 States that did not include Nicaragua.

Nicaragua referred to a fourth American who attended the Conference — Judge Manley Hudson, who participated as an observer on behalf of the Permanent Court. Judge Hudson's views have been the subject of considerable discussion, but there should be no doubt that he rejected Nicaragua's new Memorial theory.

As the dissent in the Order of 10 May notes, in 1946 and 1947 Judge Hudson listed Nicaragua's 1929 declaration as in force under Article 36 (5).

Did Judge Hudson believe that Nicaragua by ratifying the Charter had brought its previously ineffective 1929 declaration into force in 1945? The answer is clearly no. Judge Hudson listed Nicaragua on the assumption that its declaration entered into force as a result of the 1939 telegram. This is apparent from his treatise on the Permanent Court, published in 1943. Judge Hudson must, like the Registry, have assumed incorrectly that Nicaragua had carried out the intention expressed in the 1939 telegram — that is, that Nicaragua later deposited the instrument of ratification to the Protocol of Signature before the Charter of the United Nations entered into force.

There is no record in Judge Hudson's papers that he received the information as sent by the United States Ambassador to Nicaragua in 1943, or by the League in 1942. The question is irrelevant since, with Nicaragua's Memorial of 30 June, the Parties agree that Nicaragua never did accept the compulsory jurisdiction of the Permanent Court. Thus, the basis for Judge Hudson's post-war listings of Nicaragua, like those of the Registry, was based on a faulty assumption, not on Nicaragua's new theory.

What is relevant is that Judge Hudson at no time adopted the new Memorial theory, that ratification and entry into force of the Charter brought the previously ineffective 1929 Nicaraguan declaration into force. Judge Hudson expressly rejected the new Memorial theory. For example, in his letter of 12 August 1955 to the Foreign Minister of Honduras, Judge Hudson stated:

> "However, on 26 June 1945, Nicaragua signed the Charter of the United Nations, and ratified it on 6 September 1945; it became effective on 24 October 1945. This did not, in any way, affect the compulsory jurisdiction." (**II**, Counter-Memorial, Ann. 38.)

Judge Hudson also rejected the new theory in his legal opinion of December 1955. After reviewing the facts, in paragraph 36 he suggested to Honduras:

> "It is also possible that the action should be begun against Nicaragua in spite of the fact that that State is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice."

This paragraph 36 represents Hudson's personal opinion that Nicaragua was not bound. In paragraph 40 he expressed his prediction as to what the opinion of the Court might be. Hudson concluded that he: "would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction".

There is no inconsistency as alleged by counsel for Nicaragua last week. Hudson was certain of his own opinion as set forth in paragraph 36 and concluded in paragraph 40 that he would not be surprised if the Court's opinion were the same.

Unfortunately, I must digress a minute to respond to another unfounded accusation by counsel for Nicaragua last week concerning these Hudson documents. The United States in its Counter-Memorial introduced materials found in Hudson's papers on file in the manuscript division of the Harvard Law School Library. A week ago Nicaragua submitted more documents from the same source. Counsel for Nicaragua accused the United States of trying to conceal relevant information.

Of course, the accusation is as wrong as it is silly: the United States would not have expected to conceal from Nicaragua documents from that library, in the School where counsel for Nicaragua is employed. In May an attorney of my office who was otherwise not directly involved in this case briefly visited those archives. The index to the archives is a 140-page volume; the collection contains over 8,000 documents. The Department attorney had been directed to search for material that might explain why Hudson's writings listed Nicaragua as bound under Article 36 (5). The Department attorney returned with all the material he thought relevant to this particular issue. Our office conducted no further investigations in those archives until last week, upon learning from Nicaragua of the presence in the files of additional material relevant to a different subject, that is the litigation strategy of Honduras in the *King of Spain* case. The letters submitted by Nicaragua last week indeed were found in the archives, and additional relevant material as well, which Nicaragua chose not to submit on 5 October as new documents.

The Court rose at 12.58 p.m.

ELEVENTH PUBLIC SITTING (15 X 84, 3 p.m.)

Present: [See sitting of 8 X 84.]

Mr. ROBINSON: Mr. President, distinguished Members of the Court, before the lunch break we were discussing Judge Hudson's papers, and I will continue now, if I may, with your permission.

In the letters now submitted by Nicaragua and the United States, Judge Hudson continues to assert his doubts that Nicaragua had accepted the Court's jurisdiction (docs. 4, 6, 9, 11, 13 and 15, List of Documents submitted by the United States, 13 October 1984; docs. 4, 7, 8, List of Documents submitted by Nicaragua, 5 October 1984). More significantly, the best argument Judge Hudson could construct for his Honduran clients, who desperately wanted to establish jurisdiction, was to assert that Nicaragua might have become bound as a result of the 1939 telegram. Judge Hudson never endorsed this argument after receiving the opinion of the Registrar of this Court and the findings from the League of Nations archives in 1955, and he advised his clients at that time that the experts in Geneva thought it would not work. (See doc. 15, United States List of Documents.) Judge Hudson advised that Honduras could nonetheless assert the jurisdictional argument in the hope that Nicaragua would consent to argue the case. In short, Judge Hudson never endorsed Nicaragua's new Memorial theory; indeed, he never found that theory to be even remotely plausible, but rather valiantly searched for means to argue on behalf of his client that Nicaragua had in fact previously ratified the Protocol of Signature. The result however was the letters from the Registrar and the Director of the European Office of the United Nations proving to the contrary, thus leading Judge Hudson to conclude that Nicaragua was not bound under Article 36 of this Court's Statute.

Thus, there were four prominent American jurists that participated in the San Francisco Conference and in the negotiations concerning the Statute of the new Court: Hackworth, Jessup, Fahy and Hudson, and all four rejected the notion that Article 36 (5) could expand the field of compulsory jurisdiction.

Conference participants from other nations shared this point of view. Judge Krylov of this Court and a member of the delegation of the Soviet Union at San Francisco published in 1949 a detailed commentary on the Charter and the Statute, cited in the United States Counter-Memorial (**II**, para. 62). His view was that Article 36 (5) applied only to declarations of States that had been parties to the Statute of the Permanent Court (*Materials for the History of the United Nations*, Vol. I, p. 281 (1949)).

Jules Basdevant, also later a distinguished Judge of this Court, was at the Conference as a member of the French delegation. One may reasonably assume that he approved the French proposal regarding the phraseology of Article 36 (5). We know that Judge Basdevant rejected Nicaragua's interpretation of Article 36 (5) because he joined with the majority in the *Aerial Incident* case. As discussed earlier, the majority held that Article 36 (5) only applied to those States "which, at the time of their acceptance of the Statute, *were bound by their acceptance of the compulsory jurisdiction of the Permanent Court*" (*I.C.J. Reports 1959*, p. 145; emphasis added). It can only be concluded, therefore, that Judge Basdevant would find it impossible to accept Nicaragua's present claim that Article 36 (5) applied to States not bound to accept the compulsory jurisdiction of the Permanent Court as of the date of the entry into force of the United Nations Charter.

Another distinguished jurist and diplomat whose opinion of Article 36 (5) has been placed on the record is Julio López-Olivan. Mr. López-Olivan attended the San Francisco Conference in his capacity then as the Registrar of the Permanent Court, a position that he held from 1936 to 1946. Thus, Mr. Lopez-Olivan oversaw the compilation of the last *Yearbook* of the Permanent Court. Later, in 1953, Mr. López-Olivan was invited to become Registrar of this Court, and he held that post until 1960. Thus, in addition to a distinguished diplomatic career he served as the Registrar for both Courts, and was personally familiar with the negotiation of Article 36 (5).

In 1955, after having been retained by Honduras, Judge Hudson enquired of Mr. Lopez-Olivan regarding Nicaragua's status under the Optional Clause of this Court. Judge Hudson's initial letter is not available to us, and the current Registry advised us in a letter of 25 July 1984, in response to a letter of 18 July from the Agent of the United States, that, were the letter to be found in its files, the Registry's rules concerning confidentiality would prevent the Registry from giving the Parties access to that letter in the same manner that the Registry precludes any such access by the Members of this Court. In any event, Mr. Lopez-Olivan's letter of 2 September 1955 to Judge Hudson was available at Harvard Law School and is found in Annex 35 to the United States Counter-Memorial. The Registrar noted first that Nicaragua had not accepted the jurisdiction of the Permanent Court:

> "Previous Annual Reports indicated that Nicaragua had signed the optional clause but was not bound thereby by reason of its failure to ratify the Protocol of Signature of the Statute, which would appear to be correct." (Counter-Memorial, Ann. 35, **II**, p. 253.)

He then turned to Nicaragua's new theory:

> "I do not think one could disagree with the view you express [that is, Judge Hudson] when you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of the compulsory jurisdiction. If the Declaration of September 24th, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court." (Counter-Memorial, Ann. 35, **II**, p. 254.)

Thus, Mr. López-Olivan emphatically rejects Nicaragua's new Memorial theory. "It is impossible", the then Registrar of this Court says, "for ratification of the Charter to make Nicaragua's previously ineffective 1929 declaration effective."

In fact, to the best of the knowledge of the United States, no individual or delegation which attended the San Francisco Conference ever suggested that Article 36 (5) brought into force previously ineffective declarations. In the last two months the United States has reviewed all the delegation reports from the San Francisco Conference that it could find in public repositories. The bibliography compiled by the Registry lists many of these. The United States found no suggestion in any of these reports that Article 36 (5) might expand the field of compulsory jurisdiction.

A representative report is that submitted by the Chairman of the New Zealand delegation, Mr. Peter Fraser. He presented to his National Assembly a report entitled *United Nations Conference on International Organization*. The report states that paragraph 5 was added to Article 36:

> "In order to maintain so far as possible the progress towards compulsory jurisdiction already made by the Permanent Court of International Justice . . ." (P. 105.)

Thus, the New Zealand delegation, which had been one of the most vigorous proponents of compulsory jurisdiction, indicates that Article 36 (5) maintains progress already achieved, but there is not a word about expanding the field of compulsory jurisdiction.

Thus, Mr. President, we are faced with a unanimous opinion. Those that attended the conference all express the same view: Article 36 (5) only carried over to this Court the field of compulsory jurisdiction under the Permanent Court. Article 36 (5) did not expand the field to make obligations where none had existed before because a deliberate decision was made at San Francisco not to do so.

The listing of States subject to Article 36 (5) prepared by Charles Fahy for the United States Senate in 1946 shows how this principle was to work in practice. This was a thorough, contemporaneous analysis of Article 36 (5). Nicaragua claims Mr. Fahy omitted Nicaragua from his list because he relied on the last *Yearbook* of the Permanent Court. Counsel for Nicaragua also asserted that Fahy's count of 19 States was contradicted by contemporaneous statements of Judge Hackworth, Judge Jessup and Professor Quincy Wright (p. 20, *supra*). If the Court would examine the citations Nicaragua offers for this point it will find that these three gentlemen each said the number was "about 20". This can hardly be understood to contradict Mr. Fahy.

It bears recalling Mr. Fahy's statement for the Court:

> "As to particular States I think the situation as you point out is clear, that this resolution makes our declaration reciprocal; that is, only with respect to States which accepted similar jurisdiction."

He then goes on to list the 19 States, which excluded Nicaragua (Australia, Bolivia, Brazil, Canada, Colombia, Denmark, Dominican Republic, Haiti, India, Iran, Luxembourg, Netherlands, New Zealand, Norway, Panama, El Salvador, South Africa, United Kingdom, Uruguay).

He then says:

> "It is to be anticipated that a great many other States will deposit declarations. Under the old Court Statute the total number who did this at one time or another was 44. In addition to the 19 mentioned above, whose declarations continue in force, this number included Albania, Austria, Belgium, Bulgaria, China, Eire, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Paraguay, Peru, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Yugoslavia." (II, Counter-Memorial, para. 82.)

Now, how did Mr. Fahy arrive at his numbers? Counsel for Nicaragua says he simply followed the last Permanent Court of International Justice listing. The last P.C.I.J. listing, however, contained 29 States as States "bound by the clause" (*P.C.I.J., Series E, No. 16, 1939-1945*, p. 45). Moreover, the Permanent Court *Yearbook* listing named 54 States as "States which have signed the Optional Clause" (*ibid.*); whereas Mr. Fahy said the total number was 44. What accounts for these divergencies?

The answer, upon examination, appears to be as follows. Of the 54 States which the League listed as having signed the Optional Clause, ten never made their signatures effective. These were the seven States which had made their declarations subject to ratification, and failed to ratify: that is, Argentina, Czechoslovakia, Egypt, Guatemala, Iraq, Liberia and Poland; and the three States which had failed to ratify the Protocol of Signature itself — that is Turkey, Costa Rica and Nicaragua. Argentina belonged to both categories; it neither ratified its declaration nor the Protocol of Signature. So Mr. Fahy began his analysis by excluding the ten States which never accepted compulsory jurisdiction. For them, including Nicaragua, there was no possibility that Article 36 (5) might be applicable.

Of the remaining 44 States, 25 were also not eligible for the application of Article 36 (5). These included 14 other States whose declarations had once been in force, but which had expired (Albania, Belgium, China, Ethiopia, France, Germany, Greece, Hungary, Italy, Lithuania, Peru, Spain, Romania and Yugoslavia), ten States which were not original parties to the United Nations (Austria, Bulgaria, Estonia, Finland, Ireland, Latvia, Portugal, Siam, Sweden and Switzerland), and one State — Paraguay — which had denounced its declaration. The remaining 19 were those on Mr. Fahy's list.

While Mr. Fahy's analysis thus flows from the last report of the Permanent Court it does not simply repeat the listing found there. So Mr. Fahy followed the precise logic of the Statute. Those States party to the new Statute and which had never previously consented to the compulsory jurisdiction of the Permanent Court, or whose consent had expired or had been withdrawn, were not subject to the compulsory jurisdiction of the new Court. States which remained bound to the Permanent Court upon joining the United Nations as original Members had their consent preserved in accordance with its original terms for the new Court.

(6) *The Opinions of Publicists*

The opinions of publicists are nearly as unanimous as the opinions expressed by participants in the San Francisco Conference. Nicaragua, however, introduced a new document last week, the private opinion of one respected jurist, Madame Bastid, to the effect that ratification of the Charter could have operated to bring Nicaragua's declaration into force in 1945. That opinion, contained in a private memorandum to Nicaragua, is based at least in part on the supposition that the listing in the *Yearbook* represented the considered opinion of this Court's Registry. She states:

> "Under these circumstances one could maintain that the declaration made by Nicaragua falls well within the scope of the provision in Section 5 of the present Article 36. This is also the solution that results from the *Yearbook* of the Court (cf. *Yearbook 1954-55*, p. 189). Without doubt it does not bind the Court, but it cannot have failed to be the object of an attentive examination of the Registry." (Legal opinion of 3 August 1956, *infra*, p. 311, trans.)

However, we know that the first *Yearbook* of the Registry of this Court in fact repudiated the theory that the ratification of the Charter could bring a declaration into force for the first time. That first *Yearbook* rather was based on the mistaken assumption that Nicaragua had followed up on its 1939 telegram and had deposited its instrument of ratification. Moreover, scarcely a year before Madame Bastid wrote her opinion, the Registrar of this Court had in fact conducted an attentive examination and had concluded that "it is impossible" to accept the same theory as Madame Bastid proposed. Thus, the sole authority that she cited as the basis for her opinion contradicted her. At any rate, rightly or wrongly, Madame Bastid did express the theory that Nicaragua proposes in this case, but she provides no rationale other than reliance on this Court's Registry. But among publicists, Madame Bastid, as far as we know, is alone in her opinion. No one else to our knowledge has ever accepted the same theory, publicly or privately. Those scholars whose opinion is clear all assert that Article 36 (5) only applied to acceptances of the compulsory jurisdiction of the Permanent Court.

Nicaragua also introduced last week a legal opinion prepared for Nicaragua by Professor Charles Rousseau and dated 21 June 1956. Professor Rousseau examined the issue and reached exactly the same conclusion as had been reached by Mr. López-Oliván.

Professor Rousseau reviewed Nicaragua's failure to deposit the instrument of ratification and the terms of Article 36 (5). He concluded in his memorandum to Nicaragua:

> "Taking into account the conditions in which Nicaragua signed the aforementioned declaration of acceptance and the absence of transmittal of its instrument of ratification to the Secretary of the Permanent Court, it could appear that it does not figure among the States presently bound by the Optional Clause of compulsory jurisdiction." (*Infra*, pp. 312-313.)

Professor Rousseau did note that the *Yearbook* listed Nicaragua's declaration as in force, but he did not change his opinion. Concerning the *Yearbook*, he commented:

> "It is not possible, however, to give an absolute value to an indication of this nature taking into account that according to the terms of reference that appear in the preface of each *Yearbook*, prepared by the Registrar himself, 'The *Yearbook* is prepared by the Registry, and in no way involves the responsibility of the Court'."

Professor Rousseau concluded that, if Nicaragua sought to bring an Application to this Court,

> "It is to be feared that . . . Honduras could oppose with prejudice the question of the validity of the declaration of the compulsory jurisdiction of the International Court of Justice, since this declaration has not been accompanied by the transmittal of the instrument of ratification to the Registry which should have occurred normally 27 years ago."

Professor Rousseau then advised Nicaragua to file a new declaration if it wished to accept the jurisdiction of the Court. He stated:

> "A prudent precaution on the part of Nicaragua would consist, in these circumstances, of repairing as quickly as possible the omission of 1939 to eliminate a new source of possible difficulties with Honduras in the hypothesis that the International Court of Justice could be called upon to know the controversy."

Professor Rousseau's last words on the subject of jurisdiction were these: "In any case there is [there (*sic*)] an ambiguity that it is convenient to remove as soon as possible." Thus, Professor Rousseau in no way adopted Nicaragua's new theory but rather concluded to the contrary.

Professor Rosenne's views have been discussed at some length. There should be no question about his interpretation of Article 36 (5). As he states in *The Time Factor*, in order for declarations to be transferred by Article 36 (5), they were:

> "Subject to the overriding condition that the State concerned was a party to the Protocol of Signature of the Statute of the Permanent Court . . ." (*The Time Factor in the Jurisdiction of the International Court of Justice*, 1960, p. 19.)

In 1946, the eminent Polish scholar, Professor Ludwik Ehrlich, published a commentary entitled (in translation), "Charter of the United Nations, together with the Statute of the International Court of Justice". Professor Ehrlich offered this comment upon paragraph 5 of Article 36:

> "Parties to the Statute of the International Court of Justice accept herewith the transfer of the Jurisdiction of the Permanent Court of International Justice, if and to the extent this was accepted beforehand, to the International Court of Justice." (P. 116.)

Thus, in Professor Ehrlich's view, Article 36 (5) applied only if the party to this Court's Statute had previously accepted the jurisdiction of the Permanent Court.

The late distinguished Judge Abdullah El-Erian, writing in the *Columbia Journal of Transnational Law* explained that under Article 36 (5)

> ". . . *Jurisdiction subsisting in favour of the old Court*, by virtue of declarations under the Optional Clause . . . *was made to devolve on the* present Court in so far as such jurisdiction affected the parties to the new Statute." (19 *Columbia Journal of Transnational Law* 197, 202 (1981); emphasis added.)

Again, the existing jurisdiction was carried over.

Judge Reed of Canada, writing in 1946 for the *Canadian Bar Review*, described the situation as follows:

> "Forty-five nations had made declarations accepting the 'Optional Clause' under the old Statute, and about twenty of these declarations remained in effect when the new Statute came into force. Compulsory jurisdiction, under declarations still in force, was preserved by paragraph 5 of Article 36 of the new Statute . . ."

Professor Dolivet, writing in 1946, summed up Article 36 (5) in the following manner:

> "At the same time, it was also agreed that all those *Members of the United Nations, which were parties to the old Court and had accepted the clause of compulsory jurisdiction*, would automatically continue their *obligation* under the new Court for the period of its validity." (*The United Nations* 79 (1946) (with preface by Trygve Lie); emphasis added.)

And Professor Bowett, in his authoritative treatise, *The Law of International Institutions* 246-247 (1970), writes that: "Article 36 (5) provides for succession by the I.C.J. *to jurisdiction conferred upon the P.C.I.J. by declarations* under the old Article 36 (2)." (Emphasis added.)

In short, a field of compulsory jurisdiction existed for the Permanent Court, resulting from binding declarations of parties to that Court's Statute. The purpose of Article 36 (5) was to preserve as much as possible of that field of jurisdiction existing as of the date of the entry into force of the United Nations Charter, and no more.

(7) *The* Yearbook *of the Court's Registry*

The United States, Mr. President, now refers to the seventh topic relating to the interpretation of Article 36 (5), the *Yearbook* of the Registry of the Court. In his dissenting opinion in the Order of 10 May Judge Schwebel notes that the last *Yearbook* of the Permanent Court lists Nicaragua's declaration as having never come into force and the first *Yearbook* of this Court lists Nicaragua's declaration as being in force but with a cautionary footnote. Judge Schwebel asked in his 10 May opinion: "How is it that such opposite conclusions could have been reached, back-to-back as it were?" (*I.C.J. Reports 1984*, p. 202). The United States will now answer that question.

The United States Counter-Memorial stated part of the answer: the Registry "never listed Nicaragua's declaration as being unequivocally in force" (**II**, para. 123). That statement remains correct; both the original 1946 and the later 1956 footnote to the Registry's *Yearbook* about Nicaragua's instrument of ratification always served to raise doubts about the effectiveness of the 1929 declaration.

An examination of the Registry's *Yearbook* reveals three other pertinent facts. First, the *Yearbook* expressly stated that Article 36 (5) applied only to declarations previously binding the declarant to accept the compulsory jurisdiction of the Permanent Court. Thus the Registry of this Court expressly rejected Nicaragua's theory that ratification of the Charter could impose compulsory jurisdiction upon a State that had never previously accepted such jurisdiction. Second, the 1946 *Yearbook* listed Nicaragua's declaration as being in force only because of the possibility that Nicaragua had followed up its 1939 telegram and had ratified the Protocol of Signature and brought its declaration into force for the Permanent Court. Third, the Registrar's actions in 1955 confirm that the Registrar did *not* believe Nicaragua could have become bound to this Court's compulsory jurisdiction by ratification of the Charter.

We turn now to the first point, that the first 1946 *Yearbook* stated that Article 36 (5) applied only to States previously bound to accept the compulsory jurisdiction of the Permanent Court.

At page 196, for example, the first *Yearbook* in 1946 lists the States that had accepted the compulsory jurisdiction of this Court. The text explains:

> "This list also includes communications and declarations of States Members of the United Nations which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice, since their obligation under that Clause is extended to the new Court by the terms of Article 36, paragraph 5, which has been quoted above."

That statement, Mr. President, could not be more explicit. Article 36 (5) extends to the new Court the obligations of States which had accepted the compulsory jurisdiction of the Permanent Court. Similiar statements elsewhere in the 1946 *Yearbook* limit the application of Article 36 (5) to States that "had accepted" the compulsory jurisdiction of the Permanent Court and to States "which are still bound by their adherence to the Optional Clause" of the Statute of the Permanent Court (p. 207). The converse of these statements is that Article 36 (5) does not apply to a State that has not previously accepted the compulsory jurisdiction of the Permanent Court or, in other words, to a State that had not adhered to the Optional Clause of that Court by depositing its instrument of ratification to the Protocol of Signature.

These statements were discussed in the United States Counter-Memorial (**II**, para. 132). Although Nicaragua carefully ignored them last week, the statements are significant because they demonstrate that the Registry's interpretation of Article 36 (5) contradicts Nicaragua's new Memorial theory.

The second point is that the 1946 *Yearbook* listed Nicaragua only because of the possibility that the instrument of ratification to the Protocol of Signature might have been deposited by Nicaragua following up on its 1939 telegram. This is apparent from the footnote appended to Nicaragua's declaration at page 210 of the 1946 *Yearbook*:

> "According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received by the Registry."

This footnote has a double significance. First, it demonstrates the Registry was uncertain whether the legal conditions for the application of Article 36 (5) to Nicaragua had been satisfied as a result of the 1939 telegram. It may be noted in passing that at page 197 the 1946 *Yearbook* cautioned that "under present conditions, the particulars given below cannot be guaranteed as entirely accurate or complete".

Also, the 1946 footnote indicated that the Registry believed that the necessary legal conditions to be satisfied included the deposit of an instrument of ratification under the old system. Otherwise, there would be no reason to include the footnote. The footnote thus confirms what is apparent from the other statements in the 1946 *Yearbook*, that is that unless Nicaragua had brought its obligation under the old system into effect by previously ratifying the Permanent Court's Statute, Nicaragua would not be covered by Article 36 (5).

The Registry never retreated from this position. And most importantly, the last sentence of the footnote reveals that as of 1946 the Registry in The Hague had not received notification from the League of Nations archives in Geneva as to whether Nicaragua had in fact followed its telegram of 1939 with a deposit. The Registry clearly decided to give Nicaragua the benefit of the doubt and assume that such deposit was thereafter made. And therein lies the answer to Judge Schwebel's question.

The third point about the Registry's *Yearbook* is that the Registrar demonstrated again, in 1956 and 1957, that he believed that Nicaragua could not be bound by its 1929 declaration through ratification and entry into force of the Charter. As I have described, in 1955, Judge Hudson made enquiries of the Registrar, Mr. López-Oliván, who then made enquiries of the League of Nations archives as depositary. As a result of his investigations, the Registrar stated his opinion that it was "impossible" to maintain that ratification of the Charter had brought the previously ineffective 1929 declaration into force. The Registrar thereupon reintroduced the footnote into the *Yearbook* — for some years there had only been a reference to the entry into the original 1946 *Yearbook* — and, importantly, he rewrote the last sentence to reflect the new-found facts. The new footnote concluded, in the last sentence: "It does not appear, however, that the instrument of ratification was ever received by the League of Nations." (*I.C.J. Yearbook 1955-1956*, p. 195.) Furthermore, he not only changed the last sentence but the following year he introduced a new and emphatic disclaimer into the relevant chapter. The new disclaimer stated:

> "The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry, or, *a fortiori*, by

> the Court, regarding the nature, scope or validity of the instrument in question." (*I.C.J. Yearbook 1956-1957*, p. 207.)

This disclaimer has appeared in similar form in all subsequent *Yearbooks*.

Thus, when faced with a confused and incomplete record due to Nicaragua's ambivalent conduct during the life of the Permanent Court, the first Registrar chose to trust that the intention contained in Nicaragua's 1939 telegram had been carried out. At the same time, the inclusion of the footnote alerted readers that the declaration might not be effective. In 1955, when the status of Nicaragua's declaration had been confirmed, the Registrar took additional steps to ensure that readers did not rely on the listing. The Registrar might have removed Nicaragua from the list, but he evidently believed that the inclusion of the footnote and his disclaimer satisfied his duty. The United States does not criticize the Registrar's decision. The United States does disagree, however, with those who suggest that listings in the *Yearbook*, whether unequivocal or conditioned, have any effect on whether sovereign nations did or did not accept the jurisdiction of the Court. It is Nicaragua, and not the United States, that has endeavoured to give authoritative force to the Registry's *Yearbook*, and as I will later note, it is important to recall that when the footnote's last sentence was changed, the Registrar was aware of the pendency of the Honduras-Nicaragua boundary dispute, and the diplomatic delicacy that attended that dispute, and certainly he would not have wished to prejudice that situation.

At any rate, the conclusion is clear: the Registrars and the *Yearbooks* never adopted and indeed expressly rejected Nicaragua's new Memorial theory that Article 36 (5) applied to declarations that had never previously bound the declarant to accept the compulsory jurisdiction of the Permanent Court.

(8) *Other Publications*

Other publications, and publicists, often relied on the Registry's *Yearbook* listing. As a result, Nicaragua appeared on many lists. But none of these listings supports Nicaragua's theory that the ratification of the Charter brought its ineffective 1929 declaration into force for the first time. Rather they imply that Nicaragua's declaration was brought into force, if at all, as a result of what was supposed to be done under the 1939 telegram.

An excellent example of this is the paper compiled in 1948 by Mr. Dennis Myers of the State Department and entitled *Compulsory Jurisdiction of the International Court of Justice*.

First, it is apparent from the many references to the Registry *Yearbook* that Mr. Myers's paper was based upon that *Yearbook* and does not attempt to make independent determinations.

Second, the paper does not endorse Nicaragua's new theory. In fact, it begins with the statement that:

> "Compulsory jurisdiction of the International Court of Justice is a *continuation* of the compulsory jurisdiction established by Article 36 of the Statute of the Permanent Court of International Justice."

Mr. Myers's paper then lists Nicaragua's declaration as effective from the date of the telegram, 29 November 1939 and not in 1945. Thus, Mr. Myers's compilation provides no support for Nicaragua's theory that the declaration became effective upon ratification and entry into force of the United Nations Charter.

Furthermore, a footnote to the Myers paper describes the footnote in the Court's *Yearbook* and the telegram of 1939. It also notes that the index to the

League of Nations *Treaty Series* does not record deposit of the Instrument of Ratification. Thus, the reader is alerted that the declaration may not have entered into force.

Other publications also copied the *Yearbook* either directly or indirectly. For example, the first edition of *Treaties in Force*, of which counsel for Nicaragua has tried to make so much, relied on Mr. Myers's paper which in turn had relied on the *Yearbook*. I refer you to paragraphs 80 and 81 of the Nicaragua Memorial.

Neither this nor any other publication listing Nicaragua's declaration endorses or gives support to the new Memorial theory that ratification of the Charter could bring a declaration into force for the first time.

(9) The Views of the United States

We turn now to the ninth topic, the views of the United States on the interpretation of Article 36 (5).

The United States interpretation is clear from the record. As explained by the United States representatives to the San Francisco Conference, Article 36 (5) applied only to those declarations that had previously bound the declarant to accept the compulsory jurisdiction of the Permanent Court. Mr. Fahy, as you will recall, was quite specific in his Congressional testimony.

The Senate Foreign Relations Committee adopted the same interpretation of Article 36 (5). In its Report approving the proposal for a United States declaration under Article 36, the Committee stated — this is one of the most important quotes among the many that I have made here today:

> "The San Francisco Conference added an additional paragraph to Article 36 of the Statute, according to which *declarations accepting the jurisdiction of the old Court, and remaining in force*, are deemed to remain in force as among the parties to the present Statute for such period as they still have to run. Nineteen declarations are currently in force under this provision." (*Report of the Senate Committee on Foreign Relations on Compulsory Jurisdiction of the International Court of Justice*, S. Rept. No. 1835, 79th Cong., 2d Sess. at p. 105 (25 July 1946) (deposited with the Court); emphasis added.)

It thus adopted Mr. Fahy's list that did not include Nicaragua. This statement in the Senate Foreign Relations Committee Report is critical for it confirms the United States Senate's understanding that there had to be a prior binding acceptance of the Permanent Court's jurisdiction that remained in force when the Charter went into effect. And Nicaragua's declaration was not — repeat not — included in this category.

In sum, the United States delegation to San Francisco, the State Department and the Senate all understood that Article 36 (5) did not include Nicaragua's ineffective 1929 declaration. Therefore, when President Truman issued the 1946 United States declaration under Article 36 of the Statute, it was the understanding of the United States that its declaration would not be effective with respect to Nicaragua unless and until Nicaragua assumed a reciprocal obligation by depositing a new declaration under Article 36 (4) of the Statute of this Court. And, Mr. President, such a declaration has never been filed by Nicaragua.

(10) The Views of Nicaragua

Finally, what historically have been the views of Nicaragua with regard to Article 36 (5)?

All available evidence indicates that Nicaragua never believed that its previously ineffective 1929 declaration became effective upon the entry into force of the United Nations Charter. The evidence consists of statements made in 1945, of the events surrounding the *King of Spain* case, of Nicaragua's conduct in this case, and of the nearly 40 years of silence before the adoption of its new theory in its Memorial of 30 June 1984.

On page 7, *supra*, the Agent for Nicaragua referred to the existence of an official publication of his Foreign Ministry. He called it a "Yearbook" and the United States understood him to refer to a Nicaraguan publication known as the *Memoria*. The United States has submitted to the Court an excerpt from the *Memoria* for 1945, the year that Nicaragua ratified the United Nations Charter. Item 3 of the United States submission of documents of 13 October 1984 contains a copy of the original Spanish as well as an English translation of a critical entry in this *Yearbook* or *Memoria*.

The Nicaraguan Minister of Foreign Relations in 1945 was Mariano Arguello. He had also been the Head of Nicaragua's delegation to the San Francisco Conference. On 2 July 1945, the Foreign Minister submitted the United Nations Charter and the Statute of the Court to the Nicaraguan National Congress for its consideration. The 1945 *Memoria* contains the Foreign Minister's statement to his Congress regarding the Charter and the Statute of this Court.

Mr. President, if ratification of the United Nations Charter and its entry into force would subject Nicaragua to compulsory jurisdiction for the first time in its history, one would expect the Foreign Minister to advise his Congress of that fact. What then did the Foreign Minister tell his Congress in 1945? These were his remarks, which I read from the English translation of the *Memoria*:

> "To conclude, I must refer to the Statute of the International Court of Justice, which is based on the draft prepared in Washington by an International Committee of Jurists.
>
> In the work of the Conference, the Latin American countries, in keeping with their advanced international law, took a stand in favour of the binding jurisdiction of the Court in the settlement of international disputes. They had to bow to the thesis of voluntary jurisdiction which prevails on the other continents, and consequently States were left free to decide whether they wanted to submit their disputes to the international organization that was created. However, the Charter left intact the right of States to subject themselves to the jurisdiction of the Court *pursuant to earlier agreements or by virtue of future arrangements*." (Emphasis added.)

Nowhere in this, the official submission of the Statute to the Nicaraguan Congress, is there a mention of Article 36 (5). Nowhere does the Foreign Minister mention even the possibility that ratification and entry into force of the Charter and this Court's Statute would subject Nicaragua to compulsory jurisdiction for the first time in its history. Indeed, the phrase "pursuant to earlier agreements or by virtue of future arrangements" can only refer to prior or future special agreements or *compromis* and not to a unilateral declaration of 1929 that had never entered into force. One can only conclude that the Nicaraguan Government in 1945 knew that Article 36 (5) did not apply to Nicaragua and its ineffective 1929 declaration.

The United States will discuss later in this presentation the events concerning the *King of Spain* arbitral award case. At this point it is enough to refer to two facts. First, neither Honduras nor Nicaragua nor the United States referred at any time during that period to Nicaragua's new Memorial theory regarding Article 36 (5). Honduras, which did assert in its Application filed under the

Washington Agreement that Nicaragua's declaration was in force, did so on the theory that Nicaragua followed up on its 1939 telegram. Second, Nicaragua on several occasions informed the United States specifically that it had not accepted the compulsory jurisdiction of this Court.

And what was Nicaragua's belief in April of 1984 when it filed its Application, submitted its letter of 24 April and argued in the oral proceedings on provisional measures? Nicaragua asserted that Article 36 (5) provided jurisdiction because in due course Nicaragua had ratified the Protocol of Signature. If Nicaragua all along believed the new theory that it now relies upon, why then did Nicaragua not advocate this theory in April? The answer is clear: this theory was only invented after the Order of 10 May of this Court and for purposes of the 30 June Memorial of Nicaragua.

Finally, there is an eloquent silence, lasting 39 years. Nicaragua has introduced, and the United States is aware of, no evidence that the Nicaraguan Government or any Nicaraguan official ever asserted Nicaragua's new theory prior to the filing of the 30 June Memorial in this case.

Conclusion

Mr. President, the United States can only apologize for this long and perhaps tedious discussion of the interpretation of Article 36 (5). We have been exhaustive and I might say personally exhausting in our presentation because this is a central issue in this case. And we have been exhaustive and exhausting in order to emphasize that the evidence is overwhelming.

In conclusion, the text and logic of Article 36 (5), the negotiating history, the opinions of your distinguished predecessors, the views of those who participated in the San Francisco Conference, and the conclusions of eminent jurists confirm this proposition: Article 36 (5) applied only to those previously binding declarations still in force under the Statute of the Permanent Court at the time the United Nations Charter entered into force. Article 36 (5) therefore did not apply to declarations such as Nicaragua's that were never in force for the Permanent Court.

III. The Necessity of Founding Jurisdiction on the Statute of the Court

The rather extensive argument the United States has now just completed focused on the requirements of the Statute of the Court. The United States demonstrated that under Article 36 (5), Nicaragua has no claim to compulsory jurisdiction. Nicaragua's next argument proceeds directly from that premise. As developed by Nicaragua's counsel last week (p. 42, *supra*), the theory, mentioned only in passing in the Nicaraguan Memorial (para. 98), is that Nicaragua should be deemed to have consented to the Court's compulsory jurisdiction by the alleged conduct of the Parties and third States notwithstanding Nicaragua's failure to satisfy the requirements of Article 36 of this Court's Statute.

This rather startling proposition need not occupy much of our attention. The theory is flatly inconsistent with the Court's own Statute. Nicaragua freely concedes this. Counsel for Nicaragua was quite explicit last Tuesday, when he stated:

> "What is clear, Mr. President, is that the consent of Nicaragua, as implied from her conduct in face of the general opinion concerning the status of her declaration as a valid acceptance of the compulsory jurisdiction of the present Court, provides a title of jurisdiction independently of the title of jurisdiction based upon the operation of Article 36, paragraph 5..." (Pp. 46-47, *supra*; see also p. 55, *supra*.)

What title of jurisdiction is this? Nicaragua does not say, but surely it is not a title of jurisdiction recognized by the Statute of this Court. The Statute of the International Court of Justice provides three means by which a State may manifest its consent to accept the jurisdiction of the Court. A State may deposit a declaration with the Secretary-General under the Optimal Clause in accordance with Article 36, paragraph 4. A State may by prior agreement either refer a particular matter to the Court or accept compulsory jurisdiction over controversies with other parties to the agreement, pursuant to Article 36, paragraph 1, or Article 37; or a State may satisfy the conditions set forth in Article 36, paragraph 5.

The premise of Nicaragua's non-statutory argument is that it has not satisfied Article 36 (5). Nicaragua relies instead on what it calls "an independent title of jurisdiction" (p. 55, *supra*). But Nicaragua has not deposited a new declaration under Article 36 (4) with the Secretary-General of the United Nations. Nor, for purposes of this argument, has Nicaragua cited any *compromis*, treaty, convention or other agreement as a basis for jurisdiction. Thus, Nicaragua does not rely upon any Articles of the Court's Statute as the basis for this claim to jurisdiction. This, simply put, is an impossibility.

Article 92 of the United Nations Charter provides as follows:

> "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

The Statute of the Court accordingly is the governing instrument for this Institution — it is, in effect, its Constitution. The Statute provides the sole bases on which the Court can exercise jurisdiction. The Statute itself confirms this. Article 1 provides:

> "The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute."

Articles 36 and 37 of the Statute create the only possible titles of jurisdiction. This is made clear by Article 53 of the Statute. This Article governs default proceedings. It reads:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

If in a default setting, the Statute requires a finding under Article 36 or 37, then *a fortiori* only Article 36 or 37 may provide a basis for jurisdiction when, as here, the Respondent does appear.

Mr. President, the notion that jurisdiction could somehow be based upon a title outside of Articles 36 and 37 is, as I have said, impossible. In urging the contrary, Nicaragua places primary reliance on this Court's opinion in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* (*Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, p. 17). Counsel for Nicaragua has simply misread the opinion. It does not stand for the proposition that parties are free to provide their consent to jurisdiction independently of the

Statute. It stands for precisely the opposite conclusion — that is, that to establish a title of jurisdiction a State must comply with the precise requirements of the Statute. The Court stated that in the case of Article 36 (2), the relevant mandatory formal requirement is "the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute" (*I.C.J. Reports 1961*, p. 31). In that case, Thailand satisfied this mandatory requirement when it formally notified the Secretary-General that it wished to be bound through the deposit of a declaration. Nicaragua has done nothing of the kind, although it has long been aware of its non-acceptance of compulsory jurisdiction under the Optional Clause. Nicaragua's comment that "there was no special procedure for the application of the provisions of Article 36, paragraph 5" (p. 47, *supra*) is thus as baffling as it is irrelevant. The Statute provides a means for States to express their consent. Nicaragua was familiar with that means, and urged by Professor Rousseau in 1956 to do so. Nicaragua did not do so.

The Statute of the Permanent Court likewise provided a clear means for a State to express its consent — the filing of a declaration with the League along with an instrument of ratification of the Protocol of Signature. As this Court stated in *Ambatielos (Preliminary Objection, Judgment, I.C.J. Reports* 1952, p. 10 at p. 43), when a treaty expressly requires ratification as the means by which a State expresses its consent to be bound by the treaty, ratification is an indispensable requirement. Nicaragua chose not to ratify the Protocol of Signature. Nicaragua nevertheless argues that under the law of treaties its adherence to the Permanent Court's compulsory jurisdiction somehow had what it calls "essential validity" if not "formal validity" (p. 45, *supra*), and that subsequent conduct could remedy what Nicaragua terms a mere defect of form.

Interestingly, in the *Temple of Preah Vihear* case deposit of the required instrument under the present Statute was held to be a mandatory formal requirement. Nevertheless last week counsel for Nicaragua cited the *Temple of Preah Vihear* case for the proposition that the lack of deposit under the prior Statute was an irrelevant defect in form.

Nicaragua's argument is moreover based upon a conceptual confusion. There simply can be no "essential validity" without "formal validity" — that is, without the entry into force of a treaty. Nicaragua's signature of the Permanent Court's Statute never entered into force, so it is pointless to talk about the presence or absence of what counsel for Nicaragua calls the essential validity of Nicaragua's treaty obligation. The United States discusses this point at paragraph 157 of its Counter-Memorial (**II**).

That, Mr. President, is the core of our response to this non-statutory theory. Nicaragua's position must be rejected precisely because it is not based on this Court's Statute. This conclusion, it must be emphasized, is based upon policy considerations of fundamental importance.

First, to adhere to the compulsory jurisdiction of this Court is to undertake a major obligation. It is critical, therefore, that the compulsory jurisdiction of the Court be based on the clearest manifestation of the State's intent to accept such jurisdiction. Articles 36 and 37 specify how a State shall make its consent to jurisdiction. If a State has deliberately avoided declaring such consent in accordance with those provisions, then the only conclusion to draw is that the State did not wish to accept the Court's jurisdiction.

Second, Nicaragua's thesis that a State may be deemed to have given tacit consent to compulsory jurisdiction introduces intolerable uncertainty into the system. Under the tests proposed by counsel for Nicaragua, a State would never know for sure who it could sue or by whom it could be sued.

Third, to accept Nicaragua's thesis would mean that mere silence by a State suffices to create an acceptance of compulsory jurisdiction. The hypothetical legal adviser of another government would have only one course to follow. If that government did not wish to be bound — and this remains the case for the vast majority of the parties to the Court's Statute — the legal adviser would have to counsel the Foreign Ministry to reject the possibility of compulsory jurisdiction publicly and consistently. Otherwise, the government would run the risk of consenting to compulsory jurisdiction through its silence. The harmful consequences of Nicaragua's thesis for this Court and the system of compulsory jurisdiction are as obvious as they are avoidable by basing the Court's jurisdiction on the mandatory requirements of its Statute.

With this observation, the United States now turns to the factual predicate of Nicaragua's theory (first advanced in its 30 June Memorial).

Last week, Nicaragua referred to the various publications listing Nicaragua:

> "we can safely say that the objective world opinion locked Nicaragua inside Article 36 of the Statute. Nicaragua, without acting in bad faith, could not have held a different opinion. At this point, the subjective opinion of Nicaraguan officials could not change what had become a legal reality." (P. 140, *supra*.)

With all due respect, that statement contemplates a very different legal reality than the one in which we fortunately live. Indeed, the statement illustrates exactly why the contentions of Nicaragua must be rejected. Information contained in general treaty compilations, treatises, and even the Registry's *Yearbook* cannot imprison a State inside Article 36. The nation itself must accept the Court's jurisdiction. And a strict insistence on the procedures set forth in the Statute is the best way to ensure that a country does not against its will become bound. This is especially critical in the case of States that have less legal resources and that may be less informed about what is published by diverse international lawyers and institutions.

Let us consider briefly the publications that are alleged to have locked Nicaragua in this prison of compulsory jurisdiction.

There is first the Registry's *Yearbook*. How could that *Yearbook* create any legitimate expectations? As has already been pointed out, the *Yearbook* specifically disclaims any authoritative responsibility. And, in Nicaragua's case, the listing of its declaration was always subject to a cautionary footnote. All those caveats and disclaimers were intended to avoid any reliance based on that listing. Certainly this case confirms the wisdom of including the disclaimers and the caveats.

There is, next, *Treaties in Force*, and similar informational publications by other nations. How can these, any more than the Court's *Yearbook*, create any legitimate expectations that Nicaragua is bound to accept the Court's jurisdiction? In particular, how can such treaty series reasonably be held to bind the governments that publish them?

Let us consider the United States *Treaties in Force*. It is compiled by an office within my legal office. A lawyer with a wide range of responsibilities supervises that office. The work of compiling *Treaties in Force* is performed by non-lawyers subject to his general supervision. It is true that they have the authoritative evidence for treaties for which the United States is depositary. However, for other multilateral treaties they rely on the lists provided by the respective depositaries. They make no effort to verify the accuracy of such lists, nor could they. The United States is party to nearly a thousand multilateral treaties. Some of them have over a hundred parties. If the United States wished to verify independently the status of each party to each treaty, it would have to conduct roughly 30,000 verifications a year. For this reason, it is obviously impossible for the United States to warrant that the listings are all correct or to accept that it might be bound by the publication of an erroneous listing.

The United States assumes that other States that publish treaty lists also rely on the various depositaries. For example, the French foreign ministry publication to which Nicaraguan counsel referred (*Liste des traités et accords de la France*) contains a prefatory disclaimer which, in translation, reads:

> "The list of parties was established from official documents of the depositary State or international organization . . . The authors of this publication strongly recommend consulting, in the case of dispute, the depositary State or organization, the State that has assumed international responsibility for the country whose legal position on the agreement is unclear or the latter country itself . . ." (1980 edition.)

The United States and French practice are examples of the ever-increasing reliance on depositaries. It is not practical for each nation to undertake to make all the determinations on its own.

Some mistakes are therefore inevitable. Publishing an erroneous listing does not change the legal reality — it does not change the legal status of any State. Rather, it is the listing that must be changed to conform to the legal reality when the discrepancy is discovered.

This also explains the numerous cases in United States courts where reference was made to the State Department publication *Treaties in Force*. In the limited time since the introduction by Nicaragua of these citations last week, the United States has confirmed that none involved a case in which a question of treaty status was controverted by the parties. Where it has been, the Court will request an affidavit from the State Department, various diplomatic correspondence or other legal materials. This was the practice for example in the recent Federal appellate case, *Salome Bara Arnbjornsdottir-Mendler* v. *United States*, 721 F. 2d 679, 682 (9th Cir. 1983). In short, as described by the United States in its Counter-Memorial (II) at paragraph 146, *Treaties in Force* is not an authoritative statement of the United States on questions of treaty law. I have already pointed out that with respect to Nicaragua it was based on Mr. Meyers's paper which was based on the 1939 telegram.

Counsel for Nicaragua nevertheless argued that the diplomatic correspondence of the 1950s concerning the *King of Spain* case came to the attention of persons in the Legal Adviser's Office of the State Department, that the Legal Adviser's Office also publishes *Treaties in Force* and, *ergo*, the listing in *Treaties in Force* must represent a considered legal determination.

This argument would not deserve a response, except that the counsel for Nicaragua might be understood by the Court to speak with personal authority on the matter. In fact, the Treaty Office performs its functions in splendid isolation from diplomatic negotiations such as the United States mediation of the Honduras-Nicaragua boundary dispute. The staff does not have time and their duties do not envisage that they monitor the diplomatic activities of the Department of State.

Nicaragua has cited United Nations and other publications as well, but these do not imprison Nicaragua any more than the Registry's *Yearbook*. In fact, most of them derive their listings from the *Yearbook*. That they contain misinformation about Nicaragua demonstrates that they also are not infallible and may not be relied upon. Again, it is the errors that must be corrected to conform to the legal reality — not the legal reality that must be changed to conform to the error.

One more general comment is in order. Counsel for Nicaragua has endeavoured to argue that the conduct of the Parties with respect to the various publications has created legal obligations between them. Any argument that a State's conduct gives rise to a waiver or preclusion on the basis of purported acquiescence must be tested against a realistic appreciation of how States behave and what may be expected. Here, Nicaragua was listed for many years in the *Yearbook* and elsewhere. Is it realistic to expect that the United States or other nations would enquire into the listing unless there was an important reason for doing so? Of course not. States are far too burdened with actual and pressing problems than to investigate the significance of a footnote in the Registry's *Yearbook*, unless and until there is an immediate prospect of litigation. That is why the cautionary footnote is there.

The silence of States, therefore, does not imply agreement in matters of the Court's compulsory jurisdiction. It shows only that the States have had no need to investigate the issue. To transform such silence into legal obligations, either for Nicaragua or any other State ignores the realities of the conduct of States. In any event, any such implication is impermissible under this Court's Statute and must be rejected.

IV

With the Court's permission, the United States would now like to turn to the fourth and final portion of its presentation on the question of Nicaragua's right to initiate these proceedings. In this section of our argument the United States will demonstrate that the actual historical record of Nicaragua's conduct over the past 40 years creates an estoppel barring its present effort to invoke the Court's compulsory jurisdiction against the United States.

In the preceding section, the United States argued that general principles of acquiescence play no role under the Court's Statute in establishing the existence of jurisdiction.

This does not mean that conduct can never be relevant to questions of jurisdiction. Where one State has represented that it is not a party to the Court's compulsory jurisdiction, and other States place actual reliance on that representation, the first State cannot be heard to claim compulsory jurisdiction against those who earlier relied upon its contrary representations. This is exactly the case presently before the Court. Nicaragua represented to the United States that it was not bound by the Optional Clause. And the United States relied on those representations. Nicaragua therefore may not now make a claim to compulsory jurisdiction against the United States, even were it otherwise legally available, which of course it is not.

The concept of estoppel is well familiar to the Court, so no elaborate development of the relevant principle of law is required. It might be useful simply to quote from Judge Alfaro's separate opinion in the *Temple of Preah Vihear* case:

> "This principle, as I understand it, is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.
>
> Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible . . . Its purpose is always the same: a State must not be permitted to benefit by its

> own inconsistency to the prejudice of another State . . . Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right." (*Temple of Preah Vihear (Cambodia v. Thailand), Judgment, I.C.J. Reports 1962*, p. 39.)

Judge Alfaro then explained that the principle has three primary foundations: "the good faith that must prevail in international relations" (*ibid.*, p. 42), "the necessity for security in contractual relationships" (*ibid.*) and "the necessity of avoiding controversies as a matter of public policy" (*ibid.*).

Mr. President, last week Nicaragua suggested it would somehow be unfair for Nicaragua to be deemed not to have accepted this Court's compulsory jurisdiction; that it would represent a double standard to hold Nicaragua to the requirements of the Court's own Statute; and, that to question its acceptance of the Optional Clause would create a controversy where none existed in what it called "objective world" opinion (p. 140, *supra*). Now that the historical record is before us, it is clear of course that precisely the opposite is true.

In 1943, as is proved by Annex 13 to the United States Counter-Memorial, the Nicaraguan Foreign Minister told the United States his Government had not accepted the Court's compulsory jurisdiction and in fact had not even prepared an instrument of ratification to the Protocol of Signature. The Minister said that he would take the further steps necessary to accomplish this. He did not. The United States and Nicaragua could only have understood at that point that Nicaragua was not bound. That understanding was never changed. One need only refer to the position of Mr. Fahy and the Senate Foreign Relations Committee in 1946 and indeed to the observations of the United States in the *Aerial Incident* case in 1960.

Furthermore, the events of the San Francisco Conference have already been referred to. Nicaragua, represented by the same Foreign Minister, did not join, as many other Latin American countries did, in supporting compulsory jurisdiction and instead supported the Optional Clause. Upon returning to Nicaragua the Minister gave the report to his Congress on the conference previously described. It did not give any indication that ratification and entry into force of the Charter might alter Nicaragua's status. Indeed, it suggested the Court's jurisdiction would be entirely optional.

The discussions leading to the submission of the King of Spain's arbitral award to this Court in 1958 confirm this shared Nicaraguan-United States understanding. Because counsel for Nicaragua has sought to rewrite the history of these discussions, it is prudent to recall the facts.

In 1906 the King of Spain decided the Nicaraguan-Honduran border question essentially in Honduras's favour. At first Nicaragua acknowledged the award, but in 1912 it took the opposite position. As a result, in the early 1950s Nicaragua remained in occupation of territory claimed by Honduras under the award. Honduras wanted the matter resolved and hoped to look to this Court for aid.

An obstacle stood in the way, however. Nicaragua had made a reservation to the Pact of Bogotá which appeared to exclude reference of the issue to this Court. Moreover, Honduras believed that Nicaragua could not be compelled to come before this Court on the basis of Nicaragua's ineffective 1929 declaration since that declaration had never come into force.

This is not speculation. It is in the historical documents. On 15 June 1955 the Government of Honduras provided the United States with a formal statement of its views:

> "Honduras is willing to petition the Court, asking that in view of the binding and definitive character of the Award of the King of Spain, Nicaragua be ordered to execute it promptly and in good faith. By requesting execution of the Award, we are implicitly reaffirming its validity." (**II**, United States Counter-Memorial, Ann. 34, App. C.)

However, the memorandum continues:

> "Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance of and resolve the case which Honduras has considered filing against Nicaragua. Nicaragua had suggested that the two countries sign a kind of special protocol to submit the problem to the Court so that it could declare whether or not the award is valid. We could not agree to this because it would mean that we are unsure of the validity of the Award when, on the contrary, we are absolutely certain of it." (*Ibid.*)

In conclusion, that memorandum then requests the good offices of the United States of America to help overcome this problem — that is, the problem that Honduras could not proceed by Application due to Nicaragua's failure to accept the compulsory jurisdiction of this Court. The memorandum reads:

> "In view of the foregoing, the Government of Honduras respectfully requests that the Government of the United States use its good offices to the end that Nicaragua accept the compulsory jurisdiction of the Court so that Honduras may present the case referred to above." (*Ibid.*)

Six months later, after Judge Hudson had written his opinion (**II**, Counter-Memorial, Ann. 37) confirming to Honduras that Nicaragua was not bound under Article 36 of the Statute, Honduras again requested the Department of State's assistance. On 19 December 1955, the Honduran Foreign Minister outlined three possible courses of action for his Government:

> "(1) She could settle the matter by recourse to arms; (2) refer the matter to the International Court of Justice which she was willing to do, but there was some question as to the feasibility of this since the Nicaraguan Government had not accepted the compulsory jurisdiction of the Court; (3) refer the matter to the OAS under the appropriate provision of the Rio Treaty." (**II**, Counter-Memorial, Ann. 34, App. F.)

Honduras maintained this position in all subsequent conversations with the United States (**II**, Counter-Memorial, Ann. 34, App. J, App. N; doc. 18, List of the United States Documents, filed 13 October 1984, *infra*, p. 365).

After the Honduran demarche, the Department of State immediately met with Nicaragua's Ambassador to the United States and outlined the problem. The Ambassador indicated that an agreement would be necessary before the case could be submitted to the Court (**II**, Counter-Memorial, Ann. 34, App. K). Both the Agent and counsel for Nicaragua maintained last week that the United States distorts the meaning of this document by interpreting it as a statement of Nicaragua's understanding that it was not bound. It is our submission, however, that the document can only be read as the United States reads it and understood it at the time. It is clear that the "difficulty" to which Ambassador Sevilla-Sacasa referred was the need for a *compromis* or special agreement because Nicaragua had "never agreed to submit to the compulsory jurisdiction". He was clearly not referring to the terms of reference of the *compromis*. The two relevant sentences are side by side and the succeeding paragraphs in that document, which the United States introduced in full with the Counter-Memorial, confirmed Nicaragua was not concerned that Honduras might be able to establish compulsory jurisdiction against it. But if there were any ambiguity in this regard, which the United States is convinced there is not, a second exhibit to the United States Counter-Memorial — an exhibit which Nicaragua did not note in last week's presentation — records that on 2 March 1956, the same Nicaraguan Ambassador told the United States:

> "Nicaragua would probably go to the International Court of Justice if summoned by Honduras. It was not feasible, however, for Nicaragua to summon Honduras to the Court. There is some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of acceptance of the Court's jurisdiction was never sent . . ." (**II**, Counter-Memorial, Ann. 34, App. L.)

Neither of these conversations was, as alleged last week, with "a rather junior officer in the State Department at the time", nor were the memoranda merely prepared "for the files", as counsel for Nicaragua suggested last week. Mr. Newbegin, the American participant, was the third-ranking officer of the Inter-American Affairs Bureau, a senior diplomat with primary responsibility for the daily supervision of Central American affairs. Both memoranda received wide distribution within the State Department and were transmitted to the United States Embassies in both Honduras and in Nicaragua. This is competent evidence. This is decisive evidence in support of the United States claim of estoppel.

To recapitulate, during 1955 and 1956, Honduras and Nicaragua each told the United States that Nicaragua was not bound, and the United States mediation effort to help resolve their dispute was premised on that understanding.

Counsel for Nicaragua, however, argues that all three countries actually harboured some secret belief that Nicaragua had accepted compulsory jurisdiction, and that this explains their conduct.

The only relevant evidence Nicaragua has introduced, however, concerns Honduras. In documents recently submitted by Nicaragua, it appears that Honduran officials urged Judge Hudson to conclude that the domestic action by Nicaragua's Congress on the Protocol of Signature in 1935 was sufficient to bind Nicaragua under the Statute of the Permanent Court. Judge Hudson adamantly refused. In letter after letter he advised his client that more was required. Judge Hudson noted that, for example, the Nicaraguan President had not approved and published the necessary decree for domestic legal purposes, nor submitted the required instrument of ratification to the League of Nations for international purposes (see docs. 7 and 8, United States List of Documents, 13 October 1984, *infra*, pp. 351-352). In these circumstances, Judge Hudson concluded, at best Honduras might go to the Court "on the chance" that Nicaragua would accept jurisdiction, even though not compelled to do so. This appears most clearly from Judge Hudson's letter to the Honduran Foreign Minister of 17 February 1956. This letter has just been located by the United States among the Hudson papers at Harvard (doc. 9, United States List of Documents, 13 October 1984, *infra*, p. 353), and it was not introduced last week by counsel for Nicaragua.

Even with this advice, Honduras still lacked the conviction that Nicaragua would appear. Nicaragua's counsel last week suggested Honduras failed to file the case because it did not want to be placed in the position of Applicant. This is plainly wrong. As early as June of 1955, Honduras stated it was prepared to file if it could be assured that Nicaragua would appear (**II**, Counter-Memorial, Ann. 34, App. C). In February of 1956, Honduras told the United States it would avoid placing the validity of the arbitral award into question by charging Nicaragua with illegally occupying Honduras territory (**II**, Counter-Memorial, Ann. 34, App. J). Contrary to the assertions by the counsel for Nicaragua in this proceeding, Honduras did not express concern that it would be prejudiced in any way by proceeding as Applicant. The question of the terms of reference, to which counsel for Nicaragua referred last week, was only at issue if the case were to be submitted by *compromis*. In fact, Honduras did start the proceedings by application on the basis of the terms of the ultimate *compromis*.

It did not do so, however, until agreement could be reached with Nicaragua. Apparently as part of its efforts to induce Nicaragua to accept this Court's jurisdiction, Honduras moved troops into the disputed territory, as was explained in a telegram to the State Department by the United States Ambassador in Honduras, after speaking with the top officials of the Honduran Government:

> "ever since April 1956 Honduras attempting to get Nicaragua appear before international court or other neutral body to settle boundary problem and note of April 1956 suggesting international court never to date been acknowledged. Thus Honduras hoping by this action as primary and peaceful objective to stimulate Nicaragua to either arbitrate or bilateral negotiation." (**II**, Counter-Memorial, Ann. 34, App. N).

Even after the Washington Agreement was signed in July of 1957, Honduras still harboured doubts that Nicaragua would appear. This is apparent not only from the Hudson correspondence, but also by the way Honduras pleaded the case. In its written submissions it called upon the Court to act whether or not Nicaragua appeared (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), I.C.J. Reports 1960*, p. 195). Once Nicaragua appeared, however, Honduras dropped all reference to compulsory jurisdiction. In his oral argument on behalf of Honduras, the distinguished Professor Charles De Visscher based the jurisdiction of the Court solely on the provisions of the Washington accord. (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. II, pp. 34-36.)

In short, Honduras's only assertion of compulsory jurisdiction over Nicaragua appeared in its initial written pleadings despite legal advice from Judge Hudson as to the weakness of the argument. It was the very uncertainty over Nicaragua's status that explains Honduras' behaviour and litigating strategy.

It should also be stressed, however, that none of these questions about the private beliefs of some Honduran officials or about Honduran tactics is relevant to the issues on hand. As of 1956, Nicaragua had represented to the United States that it was not a party to the Optional Clause. The United States relied on this representation.

Counsel for Nicaragua nevertheless put down the following challenge last week:

> "The United States has not produced a single considered and deliberate statement by a United States official espousing the view that Nicaragua was not subject to the Court's compulsory jurisdiction. The Court will search Annex 34 and its Appendices in vain for such a statement." (P. 33, *supra*.)

The United States readily concedes that in using its good offices it did not seek to impose a legal position on either of the Parties. It bears noting, however, that the United States expended much of its effort in encouraging Nicaragua to accept the Court's compulsory jurisdiction (see **II**, Counter-Memorial, Ann. 34, App. K).

In any event to respond to Nicaragua's request for further evidence, the United States accompanied its letter of 13 October with two communications dated 19 March 1957 from the United States Ambassador in Honduras to the Assistant Secretary of State for Inter-American Affairs. In one, the Ambassador refers to "doubt as to whether Nicaragua has in fact already submitted itself to the

Court's jurisdiction". In the other, the Ambassador reports that Judge Hudson was probably advising Honduras that Nicaragua was *not* subject to the compulsory jurisdiction of the Court. In fact, we now know from Honduran Foreign Minister Duron's letter of 13 September 1957 that Honduras was very much concerned by the report of the Registrar, Mr. Lopez-Oliván, to Judge Hudson that in the absence of the deposit of an instrument of ratification to the Protocol of Signature under the Permanent Court system, it would be "impossible" (in the Registrar's words) to establish that Nicaragua was bound under Article 36 (5). As all these communications reflect, the entire premise of United States diplomatic efforts was that Nicaragua was not a party to the Optional Clause.

Counsel for Nicaragua claimed last week that Nicaragua reversed its own view that it was not bound when Madame Bastid informed Nicaragua that there was a possibility of jurisdiction in view of the *Yearbook* listing. But Nicaragua, by its own admission, had also been advised about the same time by Professor Charles Rousseau that:

> "Honduras could oppose with prejudice the question of the validity of the declaration of compulsory jurisdiction of the International Court of Justice." (Exhibit C, List of Documents Filed by Nicaragua, 5 October 1984.)

In fact, Professor Rousseau urged the filing of a new declaration by Nicaragua to resolve this problem. Nicaragua did not do so.

Mr. President, we do not know how the Government of Nicaragua responded to the two opinions submitted to it and filed with this Court last week, nor whether others were solicited. Its subsequent course of conduct, however, strongly suggests it preferred the option of being able to contest jurisdiction if sued. What is the evidence? First, Nicaragua never stated to the United States that it had changed its views. Second, in March of 1957, Honduras publicly offered to go to the Court with Nicaragua, explaining that unlike Nicaragua it (Honduras) had accepted the Court's compulsory jurisdiction (**II**, Counter-Memorial, Ann. 34, App. O). This offer was announced to all the Foreign Ministers of the Organization of American States and Spain. In its reply, also widely publicized, Nicaragua did not deny that it was not a party to the Optional Clause (**II**, Counter-Memorial, Ann. 34, App. P). Third, in the *King of Spain* case, Nicaragua manifested its hostility to compulsory jurisdiction. Because the case was brought by *compromis*, Nicaragua could not object to jurisdiction without raising serious questions about its good faith. But it could and did object to the alternative ground of jurisdiction relied upon by Honduras, the Optional Clause. As the United States pointed out on 27 April 1984 (**I**, p. 127), in the proceedings on provisional measures, Nicaragua in its Counter-Memorial in the *King of Spain* case objected to Honduras's representation that Honduras occupied the position of Applicant. Let me quote the relevant passage in our English translation:

> "It will therefore be inaccurate to consider the Honduran Government as occupying alone a position of Applicant because it was designated by the common accord as obliged to institute the case and to deposit an Application and Memorial for that purpose. Each Party finds itself in that respect in a reasonably equal position." (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I at p. 132.)

Thus, Nicaragua, while accepting jurisdiction, did not admit to compulsory jurisdiction. This conclusion is buttressed by the fact that in its introductory remarks and in its reply, Nicaragua stressed the case had been brought before the Court by common agreement, and not on the basis of the Optional Clause

(*I.C.J. Pleadings, Arbitral Award, op. cit.*, pp. 132, 133, 748). Indeed, at no time did Nicaragua acknowledge the possibility of compulsory jurisdiction under the Optional Clause. Finally, the Court in its Judgment merely recited the initial Honduran pleadings. Contrary to Nicaragua's contention in its Memorial in this case (I, Memorial, para. 77) the Court did not "recognize" any basis of jurisdiction under the Optional Clause (*I.C.J. Reports 1960*, p. 194).

Until the filing of the Application of 9 April 1984, Nicaragua never had stated that it had undertaken the obligations of compulsory jurisdiction, in so far as we know. It has been 55 years since Nicaragua's original 1929 declaration. Nicaragua has now presented hundreds of pages of written argument and made hours of oral presentation to this Court.

Yet Nicaragua has presented not one shred of evidence that anyone in Nicaragua at any time before the filing of its 9 April Application manifested his or her belief that Nicaragua was legally bound to the compulsory jurisdiction of this or the former Court. More importantly, in so far as the United States is aware, and in so far as the record before the Court demonstrates, at no time in these 55 years has the Government of Nicaragua or any official thereof made any statement to the United States even implying that Nicaragua might have validly accepted and therefore become bound by the obligations of the Optional Clause.

To the contrary, since 1943 Nicaragua has consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and, when the occasion arose when this was material to United States diplomatic activities, the United States relied upon those Nicaraguan representations. The United States submits, therefore, that Nicaragua is estopped from invoking the compulsory jurisdiction of this Court against the United States.

CONCLUSION

Mr. President, I am happy to report for all of us that this completes this exhaustive and, as I have said, exhausting presentation of the United States on Nicaragua's failure to accept the obligations of the Optional Clause of this Court's Statute. During the course of its presentation, the United States has established three basic propositions:

First, that Nicaragua knowingly never brought into force a declaration under the Statute of the Permanent Court;

Second, that in consequence, Nicaragua cannot be deemed under the plain meaning of Article 36 (5) of this Court's Statute to have accepted this Court's compulsory jurisdiction;

And third, that Nicaragua's conduct in relation to the United States over the course of many years estops Nicaragua from invoking compulsory jurisdiction against the United States, even if, contrary to fact and law, it were otherwise available.

All three propositions rely upon a fundamental consideration. The consent of States to this Court's compulsory jurisdiction is dependent upon the assurance that they will be treated with strict equality before the Court.

Nicaragua has sought to abuse this principle by requesting the advantages of Applicant while resolutely refusing to accept the responsibilities of a potential Respondent. Nicaragua has, in short, sought to create a situation of inequality before this Court.

The United States respectfully submits that the Application must be dismissed because of this fundamental want of jurisdiction.

Mr. President, I would like, with your permission, to recognize the special contribution to my presentation of two of the best attorneys, and also two of the finest persons, with whom it has ever been my privilege to be associated. They are Messrs. Michael Danaher and Jonathan Schwartz.

Now, with the Court's permission, it gives me great pleasure to request the President to call upon Deputy-Agent of the United States, Patrick Norton, who will discuss the Multilateral Treaty Reservation to the United States 1946 declaration.

ARGUMENT OF MR. NORTON

DEPUTY-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. NORTON: Mr. President, distinguished Members of the Court.

THE MULTILATERAL TREATY RESERVATION TO THE UNITED STATES DECLARATION PRECLUDES THE COURT'S EXERCISE OF JURISDICTION OVER NICARAGUA'S CLAIMS

Introduction

The Agent of the United States has shown that Nicaragua never accepted the compulsory jurisdiction of the Court and, accordingly, that Nicaragua may not invoke that jurisdiction against the United States. The contentious jurisdiction of the Court requires the consent of both Parties. Unlike Nicaragua, the United States has accepted the compulsory jurisdiction of this Court. The United States declaration of 26 August 1946 remains in force. As we shall now demonstrate, however, Nicaragua's claims do not come within the terms of that declaration. Wholly apart from the first argument that was just given by the Agent of the United States, Nicaragua's Application must therefore be dismissed.

It may be useful briefly to summarize this position of the United States. The United States declaration of 26 August 1946 contains three reservations. The third reservation, proviso "C", precludes the Court's jurisdiction over this case. We shall refer to proviso "C" as the "Multilateral Treaty Reservation". It is also sometimes called the "Vandenberg Reservation", after the United States Senator who introduced it on the floor of the United States Senate as an amendment to the Senate's approval of the United States declaration.

The United States will show that the Multilateral Treaty Reservation, read in accordance with even its narrowest possible construction, excludes Nicaragua's claims from the United States consent to this Court's jurisdiction. Specifically, Nicaragua's Central American neighbours are parties to the multilateral treaties which Nicaragua invokes, and they are not before this Court. These States have explicitly and unequivocally told the Court that they will be affected by a decision in this case. Moreover, the allegations in Nicaragua's Application place the rights and interests of the other Central American States at the very centre of this adjudication. Under these circumstances, the other Central American States will clearly be "affected by" — those are the words of the reservation — any decision of this Court on Nicaragua's claims. The Multilateral Treaty Reservation therefore precludes this Court's jurisdiction over allegations that Nicaragua bases on multilateral treaties. The United States will further demonstrate that the Multilateral Treaty Reservation in fact precludes the Court's jurisdiction over all of Nicaragua's claims, including those purportedly based on customary or general international law.

Because the Multilateral Treaty Reservation by its terms, on its face, bars Nicaragua's treaty-based claims and parallel and subordinate customary and general international law claims, Nicaragua has attempted to argue that the reservation is meaningless. Nicaragua describes the reservation as "pure surplusage" — by which Nicaragua apparently means that the reservation is redundant to the Statute of the Court and without independent effect (p. 89, *supra*). Nicaragua does not argue that the reservation is invalid, either as a matter of United States domestic law or international law.

As the United States will show, Nicaragua's argument is contrary to the most fundamental canons of interpretation of formal legal documents under both international and United States law — namely, that the legal acts of a government are always construed to be meaningful, and that such acts are always construed in accordance with the plain meaning of their terms.

Nicaragua's theory, moreover, requires imputing to the reservation an intention, as I shall show, that is directly inconsistent with its terms. And Nicaragua relies for this extraordinary interpretation on an analysis of contemporaneous United States intent that is both selective in its sources and demonstrably inconsistent with the principal sources. Further, Nicaragua's argument would require the Court to construe as meaningless the identical or similar reservations of five other States not now before the Court.

Argument

So much by way of summary. The United States will now elaborate on each of these points. The proper place to begin is obviously with the text of the reservation.

The Multilateral Treaty Reservation provides that United States acceptance of the Court's jurisdiction does not extend to:

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

The reservation thus limits the consent of the United States to the Court's jurisdiction over a specified class of disputes — those "arising under a multilateral treaty". When a State seeks to bring the United States before the Court to adjudicate a dispute arising under a multilateral treaty, the Court is without jurisdiction over the United States unless one of two specifically enumerated conditions is satisfied. Either the United States must specially agree to jurisdiction, or "all parties to the treaty affected by the decision" must also be parties to the case before the Court.

This case arises under four multilateral treaties invoked in Nicaragua's Application, most notably the Charter of the United Nations and the Charter of the Organization of American States. And, of course, the United States has not specially agreed to the Court's jurisdiction. The Court, therefore, has jurisdiction over this case only if "all parties to the treaties that would be affected by the decision are also parties to this case".

The application of the Multilateral Treaty Reservation to this case is therefore straightforward. The Court is without jurisdiction over Nicaragua's Application unless, at a minimum, all States (1) that are parties to the treaties invoked by Nicaragua and (2) that would be affected by this Court's decision, are parties to this case. The only question that this Court must address in this regard is whether there are treaty parties, other than the United States and Nicaragua, that would be affected by a decision by the Court in this case within the meaning of the language of the reservation. As the United States will now show, it is beyond dispute that Nicaragua's Central American neighbours — most notably Costa Rica, El Salvador and Honduras — would be profoundly affected, both legally and practically, by any decision that this Court could render on Nicaragua's claims.

The most probative evidence in this regard is the pronouncements of the Central American States themselves. Each of these States has taken the unusual step of advising the Court of its views on the potential harm to a peaceful resolution of the Central American conflict that this adjudication could cause. Many of these statements were quoted by the Agent of the United States in the introduction this morning. We will not repeat all of those quotations here, but I would respectfully refer the Court to them. Some, however, bear repetition for they demonstrate how seriously the Central American States view these proceedings.

In its letter to the Court of 17 September, El Salvador, for example, stated:

> "El Salvador is persuaded *in the considerations of its own survival as a nation* that to subject an isolated aspect of the Central American conflict to judicial determination at this time would cut straight across the best hopes for a peaceful solution" (emphasis added).

At the provisional measures stage in April Honduras told the Court that:

> "The Government of Honduras . . . views with concern the possibility that a decision by the Court could affect the security of the people and the State of Honduras, which depends to a large extent on the bilateral and multilateral agreements on international co-operation that are in force . . . if such a decision attempted to limit these agreements indirectly and unilaterally and thereby left my country defenceless." (**II**, United States Ann. 104 — **I**, p. 309.)

Costa Rica has also expressed its views on Nicaragua's Application to the Court, noting that:

> "the 'case' presented by the Government of Nicaragua before the Court touches upon only one aspect of a more generalized conflict that involves other countries within the Central American area as well as countries outside the region" (**II**, United States Ann. 102 — **I**, p. 306).

Nicaragua's Central American neighbours have also advised the Court of their specific concern that adjudication of Nicaragua's claims in this tribunal would affect their interests by undermining the Contadora negotiations now under way. El Salvador told the Court in April that, as one of the parties to these region-wide negotiations, it considers the Contadora Process to be "the *uniquely* appropriate forum . . . in which to seek a realistic, durable, regional peace settlement that would take the manifold legitimate interests of each participating State into full account" (**II**, United States Ann. 103 — **I**, p. 307). Likewise, Guatemala, Honduras and Costa Rica have each expressed concern that a decision of the Court in this case would interfere with the Contadora negotiations. They, too, could be quoted at length here and, in certain respects, were quoted in the United States introduction. The United States will not repeat these quotations now but refers the Court to United States Annexes 102, 104 and 103 (**I**, pp. 305-309).

Mr. President, the basic and irrefutable point that the United States wishes to emphasize is this: the other Central American States have stated, expressly, unambiguously and repeatedly, that they will be affected by any decision of the Court in this case. Nicaragua and only Nicaragua denies these effects. Nicaragua cannot speak for its neighbours. They speak quite well for themselves.

Moreover, the fallacy of Nicaragua's contention that a decision in this case can be reached without affecting the legal and practical interests of the other Central American States is apparent in Nicaragua's own submissions to the

Court. Nicaragua's pleadings on their face demonstrate that any decision that this Court could render would necessarily delimit the rights and obligations of Nicaragua's immediately contiguous neighbours — Costa Rica and Honduras.

Thus, in its Application Nicaragua alleges that the United States has armed and trained forces opposed to the present Government of Nicaragua. The Application makes clear Nicaragua's position that these alleged United States actions were carried on in concert with the Government of Honduras. Nicaragua contends, for example, that a "mercenary army" — a deliberately inaccurate use of the term, by the way — allegedly created by the United States has been recruited in Honduras, has been trained in Honduras, and has been installed in base camps in Honduras (**I**, Application, Ann. A, "Chronological Account", para. 5).

According to Nicaragua's formal pleadings, these forces conduct attacks on Nicaraguan territory from inside Honduras (**I**, Chronological Account, para. 1). Nicaragua contends that *armed forces of the Government of Honduras* have transported these forces to the Nicaragua-Honduras border, and Nicaragua alleges that arms and other military equipment were provided to these armed forces by the United States through military depots of the Government of Honduras (*ibid.*, para. 7).

Nicaragua's southern neighbour, Costa Rica, is also a target of allegations in Nicaragua's presentation to this Court. Nicaragua has alleged to the Court that there are 2,000 United States supported "mercenaries" on its southern border (**I**, Affidavit of Miguel D'Escoto Brockmann, Exhibit II submitted during oral proceedings on provisional measures, para. 5), and that forces originating from Costa Rican territory have attacked Nicaraguan territory. According to Nicaragua, these forces have received extensive support from airplanes, helicopters, and ships that take off from bases in Costa Rica. Nicaragua alleges that the Government of Costa Rica is also acting in concert with the United States (**I**, Affidavit of Luis Carrion, Exhibit I submitted during oral proceedings on provisional measures, para. 4).

Mr. President, at this stage in these proceedings, the United States does not address the accuracy of any of Nicaragua's factual assertions, whether they are aimed at the United States or at Nicaragua's Central American neighbours. No analysis of the *merits* of Nicaragua's factual allegations is necessary for the Court to conclude that the multilateral treaty reservation precludes the Court's jurisdiction here. Nicaragua alleges that the United States has acted in concert with Honduras and Costa Rica, and that these actions violate international law. The Court cannot determine the legality of alleged United States actions without also passing upon the actions that Honduras and Costa Rica allegedly are taking in concert with the United States.

Indeed, Nicaragua admits (p. 85, *supra*) the assertion of the United States that:

> "It is well settled that a State that permits its territory to be used for the commission of internationally wrongful acts against another State itself commits an internationally wrongful act for which it bears international responsibility."

A fortiori, a State acting *in concert with* another State committing internationally wrongful acts must itself be committing wrongful acts — and that is precisely what Nicaragua's pleadings assert Honduras and Costa Rica are doing. Mr. President, these are the plain and ineluctable implications of Nicaragua's own pleadings in this case. Under the circumstances Nicaragua's denial that it places in issue the legality of other States' conduct (p. 85, *supra*) rings hollow and should not be admitted by the Court. *Allegans contraria non audiendus.*

The United States emphasizes again that the only question before the Court in this regard is whether absent treaty parties would be "affected by" a decision of this Court. And, again, the conclusion that the other Central American States would be "affected by" a decision in the present case is irrefutable in light of (1) their own statements and (2) the unavoidable implications of Nicaragua's pleadings.

Two further points in this regard are warranted. First, Nicaragua agrees that under the admissibility standards of the *Monetary Gold* case, an application is inadmissible when the rights of third States "form the very subject-matter of the decision". Tomorrow, Professor John Norton Moore will show that this case *is* inadmissible under the standards of *Monetary Gold*. For present purposes, it should be noted that the very passage on which Nicaragua relies for this construction indicates that a State's interests may be legally affected even if they do not "form the very subject-matter of the decision". I quote the passage from *Monetary Gold* in full: "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision." Thus, whether or not the present case comes within the standards of *Monetary Gold*, that decision clearly indicates that the interests of the absent Central American States may be "affected by" a decision of this Court and hence barred by the Multilateral Treaty Reservation.

Secondly, Nicaragua criticizes the "affected by" language of the reservation as excessively vague (p. 96, *supra*). Like many other expressions in legal documents, the precise limits of this phrase are unspecified. But this does not suggest that they are meaningless or that the Court should give them no content. And indeed, here the Court need not determine the outer bounds of the expression "affected by". By *any* construction or standard, by any interpretation of the plain meaning of those words the interests of the Central American States in a decision in this case come squarely within that expression.

The plain language of the Multilateral Treaty Reservation, in short, requires that all of Nicaragua's claims based on multilateral treaties be barred. Since the only issue that the Court need reach is the proper application of the terms of the reservation, it is not necessary to go behind the text to the underlying policies it reflects. These are, however, important policies and perhaps it is worth a moment to examine them.

As is discussed in greater detail in the United States Counter-Memorial, the Multilateral Treaty Reservation addresses three concerns. First, the reservation protects the United States from being *bound* by a decision of the Court interpreting a multilateral treaty unless all parties to a dispute arising under the multilateral treaty are also bound by the Court's decision. Second, the Multilateral Treaty Reservation requires the participation of all parties affected by the proceedings, and therefore ensures both the Court and the parties of full and fair development of relevant facts and legal argumentation. Third, the Multilateral Treaty Reservation ensures that the legal rights and practical interests of third States that are parties to a multilateral dispute will not be determined when such States are not before the Court. Nicaragua's Application gives rise to each of these concerns and therefore is precisely the sort of case that comes within the reservation's exclusion from jurisdiction. Let us now examine each of these points in turn.

By including the Multilateral Treaty Reservation in its declaration, the United States intended to ensure that, unless all parties to a dispute arising under a multilateral treaty would be bound by a decision of the Court applying the treaty to a dispute the United States would not be bound. The United States therefore did not consent to adjudicate such disputes before the Court unless all other treaty parties involved in the dispute were also present before the Court and hence would also be bound pursuant to Article 59 of the Statute. As the United States indicated in its Counter-Memorial, the future United States Secretary of State John Foster Dulles originally raised this concern. Mr. Dulles rightly observed that: "Oftentimes . . . disputes, particularly under multilateral conventions, give rise to the same issue as against more than one nation." (**II**, United States Ann. 106.)

Mr. Dulles then stated as his specific concern that:

> "It might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties to such a dispute is similarly bound, *the others not having bound themselves to become parties before the Court*."

I will come back to that in a moment because it is a very important clause

> "and, consequently, not being subject to the United Nations Charter Provision (Art. 94), requiring Members to comply with decisions of the Court in cases to which they are a party" (**II**, United States Ann. 106, emphasis added).

Mr. Dulles was thus concerned that, in multilateral disputes, particularly those arising under multilateral treaties, there is a risk of fragmented or partial adjudication of the mutual rights and obligations of the parties to the dispute.

The United States will return in a moment to Nicaragua's tortured attempt to narrow Mr. Dulles's concerns to a meaningless redundancy. For present purposes, it suffices to note that Mr. Dulles was identifying obvious problems inherent in bilateral adjudication under a system where jurisdiction is by no means universal. In a multilateral dispute, the rights and obligations of any two parties to the dispute *inter se* may be inextricably related to their rights and obligations toward third States. If those third States have not accepted the Court's compulsory jurisdiction, an applicant cannot bring them before the Court. Even if the third States have accepted the Court's compulsory jurisdiction, a respondent State cannot compel them to appear unless the respondent has claims against them. A decision by the Court can therefore result in a binding determination of the parties' rights and obligations in a whole or partial vacuum, and in the actual dispute — a dispute in the real world of international relations — only the parties will be so bound. The potential for unfairness or prejudice to one of the parties, presumably the respondent, is evident.

This is to discuss the issue abstractly. The present case, however, is a graphic illustration of precisely the problem foreseen by the Multilateral Treaty Reservation.

Nicaragua argues that the United States is engaged in military and paramilitary activities within and against Nicaragua. The United States responds that Nicaragua is engaged in military and paramilitary activities in and against other Central American States, which have called upon the United States for assistance. Thus, United States actions are in exercise of the right, indeed the duty, to engage in collective self-defence with the other Central American States in response to Nicaragua's acts. The rights of the United States are necessarily connected to, if not derivative from, the rights of the other Central American States to defend themselves against Nicaragua.

The other Central American States agree with this analysis. El Salvador, for example, in its Declaration of Intervention, filed 15 August 1984 (**II**, p. 456) stated:

> "In the opinion of El Salvador . . . it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining

> the legitimacy or the legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua."

The United States would also call the Court's attention again to the statement of the Government of Honduras in United States Annex 104, which we quoted earlier.

In the absence of the other Central American States, the Court cannot properly assess the relevant facts or the rights of those States and, hence, cannot assess the rights of the United States. Further, any order of the Court binding the United States and Nicaragua *inter se* in a region-wide dispute involving on-going armed hostilities would necessarily leave undetermined the rights and obligations of the United States and Nicaragua toward the other States involved in this real-world dispute. It is precisely to prevent such fragmented applications of international law to complex multilateral problems that the Multilateral Treaty Reservation is addressed. The United States did not consent to partial adjudications of this nature.

The second and related concern underlying the reservation is that the Court will adjudicate a dispute without access to directly relevant information in the possession of third States. This Court may, under Article 66 of its Rules, obtain evidence "at a place or locality to which the case relates . . .". To do so, the Court, pursuant to Article 44 of the Statute, "shall apply directly to the Government of the State upon whose territory the notice has to be served". Nicaragua asserts that these provisions would assure the Court of a full factual record even if the other Central American States are not parties to the case. Mr. President, this assertion is plainly disingenuous.

Nicaragua's allegations of the unlawful use of force would require this Court to examine, presumably in some detail, the on-going armed conflict in Central America — a conflict involving, by admission of both Parties, regular and guerrilla forces in five States over thousands of square miles of jungle and mountain. Mr. President, no State embroiled in such an armed conflict can be expected to disclose publicly detailed information related to that conflict. No State can be expected, in particular, to reveal such information to the very State it accuses of being behind the armed attacks against it. No State can be expected to reveal the status of its own military forces, or its knowledge of its adversaries and the means by which it obtains that knowledge.

Finally, the Multilateral Treaty Reservation ensures that the rights and obligations of third States will not be adjudicated in their absence. As we have noted, Nicaragua's Application necessarily implies an adjudication affecting the international responsibility of Honduras and Costa Rica. And El Salvador has advised the Court that the legality of its actions may also come into issue. The United States has historically refused to consent to international arbitration or adjudication of the interests of absent third States, in both bilateral and multilateral dispute resolution agreements, including the General Treaty of Inter-American Arbitration of 1929. This long-standing practice is explained at some length in our Counter-Memorial. Although there is no direct evidence that the Multilateral Treaty Reservation was inspired by this concern, it is consistent with long-standing United States practice, and one can reasonably presume that its drafters were familiar with that practice (see M. Hudson, "The World Court, America's Declaration Accepting Jurisdiction", 32 *American Bar Association Journal*, p. 832, at para. 836, No. 2, 1946).

We repeat that it is the duty of the Court here to apply the multilateral treaty reservation, not to analyse its underlying rationale. But we hope that this explanation of that rationale demonstrates that the reservation is directed at genuine concerns, and that any failure to apply the reservation would necessarily jeopardize those concerns. Indeed, it is difficult to imagine a case coming more squarely within not only the terms of the Multilateral Treaty Reservation but also its rationale.

Perhaps it is useful now to turn to Nicaragua's argument. In Nicaragua's Memorial of 30 June (**I**, para. 263) Nicaragua quoted in full the relevant section of Mr. Dulles's memorandum, which I quoted a moment ago.

The next sentence of Nicaragua's Memorial reads as follows:

> "Thus, the Vandenberg Amendment would appear to create an exception to the United States' acceptance of compulsory jurisdiction of the Court with respect to disputes arising under a multilateral treaty where not all of the parties to the dispute are present before the Court." (**I**, para. 264.)

That is precisely the position of the United States. Between the submission of its Memorial and its oral argument heard here last week, however, Nicaragua changed its views.

Nicaragua's new position appears to be as follows: Nicaragua contends that certain portions of the legislative history of the Multilateral Treaty Reservation suggest that its drafters had a single, narrow concern. That concern, according to Nicaragua, was to prevent the United States from being brought before this Court by several applicant States, some of which had not previously accepted the Court's compulsory jurisdiction. Nicaragua observes, correctly, that such a concern was unnecessary because Article 36 of the Court's Statute (as we have explained at length today) does not permit States that have not accepted compulsory jurisdiction to file applications against States that have accepted the compulsory jurisdiction. Nicaragua concludes that the Multilateral Treaty Reservation was therefore redundant, and should be treated as a meaningless nullity.

This argument is fatally flawed in many respects.

First, Nicaragua asks the Court to ignore the plain meaning of the text of the reservation and to deny it lawful effect. This violates the most fundamental canons of interpretation of both the international law applied by this Court and the law of the United States, with which the United States Senate was undoubtedly familiar. Under international law, as the law of treaties for example demonstrates, international instruments are always interpreted first in accordance with the plain meaning of their texts. Further, under international law, all of the clauses of a written instrument are presumed to be meaningful. The United States canons of statutory construction are very similar.

In the *Corfu Channel* case (Merits), the Court rejected the contention that the Special Agreement governing its jurisdiction contained superfluous language, because

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision . . . occurring in a Special Agreement should be devoid of purpose or effect." (*I.C.J. Reports 1949*, p. 24.)

As Sir Hersch Lauterpacht noted in the last edition of *Oppenheim's International Law*, Volume I, page 955 (7th ed., 1952),

> "It is to be taken for granted that the Parties intend the provision of a treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective."

Nicaragua has argued that the law of treaties should be applied to unilateral declarations. Assuming, *arguendo*, that the law of treaties is applicable either directly or by analogy, the Court should take note of Articles 31 and 32 of the Vienna Convention on the Law of Treaties and of the commentary of Nicaragua's counsel, Professor Brownlie, thereon. Article 31 defines the "context" in accordance with which a treaty should be interpreted. Article 32 then provides that recourse may be had to supplementary means of interpretation, including preparatory works, where the application of Article 31 leaves the meaning ambiguous. The distinction between the "context" and other "supplementary means of interpretation" such as preparatory works (*travaux préparatoires*), is to quote Professor Brownlie, "justified since the elements of interpretation all relate to the Agreement between the parties 'at the time when or after it received authentic expression in the text' ". Endorsing the views of the International Law Commission, Professor Brownlie continues:

> "Preparatory work did not have the same authentic character as the text 'however valuable it may sometimes be in throwing light on the expression of agreement in the text'." (*Principles of Public International Law*, 3rd ed., p. 625.)

To be sure, both international law and United States law resort to preparatory materials if there is an ambiguity in a text. But, this Court has, consistent with the Rules of the Vienna Convention, followed the consistent practice of its predecessor, under which "there is no occasion to resort to preparatory works if the text of a convention is sufficiently clear in itself" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion* (*I.C.J. Reports 1947-1948*, p. 57 at p. 63).

It is true that the United States Multilateral Treaty Reservation does contain an ambiguity. But it is not the ambiguity that Nicaragua purports to identify. As the United States indicated in its Counter-Memorial, scholars discussing the reservation at the time of its inclusion in the declaration disagreed about whether the reservation required the presence before the Court of all treaty parties, or only of those treaty parties that would be affected by the Court's decision. To describe the ambiguity in another way, it is uncertain on the face of the text whether the phrase "affected by the decision" modifies "parties" or "treaty". If it modifies "parties", then only those "parties affected by the decision" need be before the Court.

In this case the particular debate about the scope of the Multilateral Treaty Reservation does not need to be resolved. The United States argues that Nicaragua's claims come within even the narrowest construction of the reservation, namely that parties that would be affected by a decision of the Court must be before the Court.

The United States would note that if the broader interpretation of the Multilateral Treaty Reservation advocated by, for example, Judges Hudson and Lauterpacht were accepted, Nicaragua's claim would nonetheless be barred. To repeat that broader interpretation, it would require that all parties to the treaties invoked in the Application must be before the Court. All parties in the treaties are obviously not before the Court, and Nicaragua's claim would thus clearly be barred. It is, therefore, no surprise that Nicaragua does not enter into the longstanding debate about the only ambiguity on the face of the reservation.

The Court rose at 6 p.m.

TWELFTH PUBLIC SITTING (16 X 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

Mr. NORTON: Mr. President, distinguished Members of the Court, the Court will recall that when we adjourned last evening the United States was explaining the effect of the Multilateral Treaty Reservation. The United States explained that by the plain terms of that reservation Nicaragua's claims are excluded from the consent of the United States unless other treaty parties affected by any decision of this Court are also before the Court. The United States further explained that the other States of Central America would indeed be affected by the decision of this Court. That conclusion is supported by the statements of the other Central American States and by the ineluctable implications of Nicaragua's own pleadings. The United States also explained the rationale for the multilateral treaty reservation and concluded that Nicaragua's claims come squarely within the terms of both the plain language and the rationale for the reservation.

At the conclusion of yesterday afternoon's session, the United States was beginning to discuss the argument that Nicaragua has advanced against this conclusion. We will continue with that explanation this morning. It may be useful at the outset to repeat our understanding of Nicaragua's position. Nicaragua contends that certain portions of the legislative history of the Multilateral Treaty Reservation suggest that its drafters had but one concern. That concern, according to Nicaragua, was to prevent the United States from being brought before this Court by several applicant States some of which, but not all of which, had not previously accepted the Court's compulsory jurisdiction. Nicaragua observes correctly that such a concern was unnecessary. Article 36 of the Court's Statute does not, of course, permit States which have not accepted the compulsory jurisdiction to bring claims against States that have. Nicaragua concludes that the Multilateral Treaty Reservation was therefore redundant and should be treated as a meaningless nullity.

Yesterday afternoon the United States explained that this argument is flawed in the first instance because it requires the Court to violate two fundamental canons of treaty interpretation or indeed the interpretation of any international instrument, namely that every instrument is construed to be meaningful and that every instrument is intended to be construed in accordance with its own plain terms. There are other fatal defects to Nicaragua's argument. The logical implications of Nicaragua's argument go beyond simply denying legal validity to a text that is, in this respect, unambiguous. Nicaragua's argument, as we shall now show, implies that the drafters of the Multilateral Treaty Reservation had a narrow intention that is directly the opposite of what the reservation says.

Let us look at the text of the reservation again. It states that the United States does not consent to the Court's jurisdiction unless certain States "are also parties to the case before the Court". The reservation is thus specifically concerned with the possibility of adjudication in the absence of certain States.

Nicaragua, through a manipulation of incomplete references to the legislative history, attempts to turn this concern on its head. Nicaragua tells us that the concern of the drafters was to prevent situations where, in a case to which the

United States was already party, other States might join even though they had not accepted the Court's compulsory jurisdiction. In other words, Nicaragua argues that the concern was with a case going forward against the United States with improper parties *present* in the case. But the reservation plainly speaks of a concern about a case going forward against the United States in the *absence* of other parties. It would be extraordinarily difficult to craft an interpretation of the Multilateral Treaty Reservation more flagrantly at odds with its express concern about absent parties.

As we have indicated, resort to legislative history is inappropriate here. The text offers no hint of an ambiguity in favour of Nicaragua's construction. It is instructive, however, to review Nicaragua's use of the legislative history for here, too, Nicaragua turns the evidence upside down.

The legislative history in this regard is admittedly meagre. A brief mention in a Committee report and less than half a page of floor debate cast little light on the intent of the State Department drafters of the text, the Committee Senators and staff who reviewed it, or the dozens of Senators who voted for it but made no comment on the floor.

In any event, the legislative history does not support Nicaragua's contention that the drafters were concerned with the possibility that the United States could be brought before the Court by States that had not accepted the compulsory jurisdiction. Since Nicaragua agrees that the reservation had its genesis in the concerns of John Foster Dulles, it is useful to quote Mr. Dulles in full again to emphasize exactly what his concerns were. In speaking of disputes that "give rise to the same issue as against more than one nation", Mr. Dulles said:

> "Since the Court Statute [Article 36 (2)] uses the singular 'any other State', it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties to such a dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the [United Nations] Charter provision [Art. 94] requiring members to comply with decisions of the Court in cases to which they are a party." (**II**, United States Ann. 106.)

Mr. Dulles was concerned with the United States being brought before the Court by one party to a multilateral dispute and consequently being bound by a decision of the Court when other States, parties to the same dispute, could not be brought before the Court and thus could not be so bound. This is why he speaks of Article 36 (2)'s reference to "any other State" as being in the singular. Any other one State to a multilateral dispute could, without the Multilateral Treaty Reservation, bring the United States into Court on that dispute. Since the other States parties to that dispute had not — in Mr. Dulles's words — "bound themselves to become parties", a case could proceed in their absence and, pursuant to Article 59 of the Court's Statute, those other parties to the dispute would obviously not be bound by a decision of the Court. Mr. President, the present case is a striking illustration of this concern.

Nicaragua's suggestion that Mr. Dulles's concern — indeed his sole concern — was having States not previously bound to the compulsory jurisdiction come into the case as improper parties contradicts Mr. Dulles's own words. It should also be noted that Nicaragua's argument implies that Mr. Dulles, a participant in the San Francisco Conference and one of the leading international lawyers of his generation, advocated a reservation that was meaningless because he did not understand the most obvious feature of Article 36 of the Court's Statute.

Moreover, Mr. Dulles's seminal memorandum and the other legislative history cited by Nicaragua is not the whole of the contemporaneous evidence. Francis Wilcox, assistant to the Senate Foreign Relations Committee and author of perhaps the most thorough history of the Senate's consideration of the United States 1946 declaration, understood the reservation exactly as does the United States now ("The United States Accepts Compulsory Jurisdiction", 40 *American Journal of International Law*, 1946, p. 699). Judge Hudson was also a participant and consultant in the Senate's approval process. Judge Hudson interpreted the reservation broadly to require that all parties to a treaty, not just those affected, be in a case; but he never suggested the reservation was a meaningless redundancy.

The State Department, which actually drafted the reservation, also believed the reservation to be meaningful at the time. Thus, in an internal memorandum, which we have submitted as Supplementary Annex 20 (*infra*, p. 367), the Office of the Legal Adviser, only a few months after the United States filed its declaration, enquired into the applicability of the Multilateral Treaty Reservation to a proposed trusteeship agreement relating to Japanese-mandated islands after World War II. It concluded that the contemplated agreement was a multilateral treaty and, hence, that any disputes arising out of the agreement would be subject to the Multilateral Treaty Reservation. Because of the reservation, the Office of the Legal Adviser concluded that the proposed agreement:

> "would permit as a limitation upon the agreement of the United States to compulsory jurisdiction of the Court over disputes arising under the trusteeship agreement, the requirement that all parties affected by the decision must also be parties to the case before the Court".

This was the Department's position in 1946; it is the Department's position today.

Finally, Nicaragua's argument is contrary to directly relevant State practice. Reservations the same as, or very similar to, the United States Multilateral Treaty Reservation appear in the declarations of five other States. The reservations of Malta and Pakistan are identical to the United States reservation. The reservations of El Salvador, India and the Philippines are similar, but eliminate the ambiguity in the United States reservation by expressly providing that the Court is without jurisdiction over multilateral disputes unless all treaty parties are before the Court. Each of these States, then, shares the United States concerns about disputes arising under multilateral treaties and has adopted reservations designed to limit its consent to the Court's jurisdiction over them. Plainly, these States understand that the Multilateral Treaty Reservation is not meaningless.

Moreover, this is not the first time that a State's "Multilateral Treaty Reservation" has been invoked in this Court. In the *Trial of Pakistani Prisoners of War* case (*I.C.J. Reports 1973*), India, which did not have a Multilateral Treaty Reservation in its declaration at the time, invoked Pakistan's Multilateral Treaty Reservation against Pakistan on the basis of reciprocity (*I.C.J. Pleadings, Trial of Pakistani Prisoners of War*, pp. 142-143). At issue in that case was the interpretation of an Indian reservation to the Genocide Convention. Fifteen other States had the same reservation, and India argued that, under Pakistan's Multilateral Treaty Reservation, all 15 would therefore be affected by the Court's decision. Pakistan disagreed. The dispute, as the Court will undoubtedly recall, involved 195 Pakistani prisoners of war in India. The only other State arguably involved in the dispute was Bangladesh. But Bangladesh was not a party to the Genocide Convention and therefore outside the ambit of the Multilateral Treaty Reservation. Pakistan argued that no other States would be "affected by the Court's decision on the merits of the case" because no other States had any interest in the prisoners of war (*op. cit.*, p. 91). Pakistan's reservation was, and is, identical to that of the United States. Pakistan took the narrow view of that reservation as requiring only the parties actually affected by a prospective Court decision to be before the Court. India took the broad view of the reservation as requiring the presence before the Court of all parties to the multilateral treaties out of which the claims arose. A decision was not, of course, rendered on this issue, but the point here is that neither India, nor Pakistan, understood the Multilateral Treaty Reservation to be meaningless or, in Nicaragua's words, "pure surplusage". Moreover, a year later, India replaced its earlier declaration with one that contained a Multilateral Treaty Reservation.

In short, Mr. President, there is simply no support for Nicaragua's extraordinary interpretation of the Multilateral Treaty Reservation. The reservation must be applied in accordance with the plain meaning of its terms, and those terms bar Nicaragua's treaty-based claims.

The United States has thus demonstrated that, pursuant to the terms of the Multilateral Treaty Reservation, the United States has not consented to the adjudication of Nicaragua's treaty-based claims. The United States will now demonstrate that Nicaragua's claims ostensibly based on "customary and general international law" may not properly be adjudicated under these circumstances.

The United States argument is twofold. First, Nicaragua's customary international law claims do not differ in substance from Nicaragua's treaty-based claims. That is to say, although Nicaragua purports to identify separate legal bases for its claims, Nicaragua's allegations do not differ in their nature or in the putative facts on which they rest. Second, as a matter of both law and judicial propriety, the Court cannot adjudicate Nicaragua's customary law claims if it is precluded from adjudicating the treaty-based claims. This is so both because Nicaragua has failed to identify any specific sources of customary law pertinent to its claims other than the treaties it invokes, and because it would be improper to adjudicate claims between the Parties without reference to the specific legal authorities that govern their mutual rights and duties.

First, with respect to the substance of Nicaragua's claims: it would be tedious to recite verbatim all of Nicaragua's customary international law claims. In brief, Nicaragua claims that the United States has breached alleged obligations under customary international law "to respect the sovereignty of Nicaragua" (**I**, Application, para. 20); "not to use force or the threat of force" against Nicaragua (*ibid.*, para. 21); "not to infringe the freedom of the high seas or interrupt peaceful maritime commerce" (*ibid.*, para. 23); and not to "kill, wound or kidnap citizens of Nicaragua" (*ibid.*, para. 24).

All of these allegations are variants on, and subsumed by, the more general allegations that the United States is using armed force against Nicaragua and unlawfully intervening in Nicaragua's internal affairs. Indeed, if Nicaragua does not contend that the specific alleged acts are unlawful uses of force or unlawful interventions, it is difficult to see what the factual predicate for Nicaragua's treaty-based claims is for Nicaragua's treaty-based claims do specifically include, *inter alia*, these more general claims that the United States has unlawfully used armed force against and within Nicaragua (*ibid.*, paras. 15, 18) and has intervened in the internal affairs of Nicaragua (*ibid.*, para. 16).

Contrary to Nicaragua's contentions, a perusal of the Application thus shows that Nicaragua's customary law and treaty-based claims are in substance the same. The one set merely paraphrases or makes more specific the other. With respect to the substantive equivalency of the allegations Nicaragua states only that "the Application unequivocally divides the claims of Nicaragua into two sets . . ." (p. 98, *supra*). But this begs the question. The point at issue is not whether Nicaragua has listed its claims twice but whether one list is substantively equivalent to the other. Nicaragua does not deny the equivalency because, we submit, it is undeniable.

Nicaragua notes correctly that pleadings based on alternative or multiple causes of action are accepted practice in this Court and most domestic legal systems (p. 98, *supra*). But this truism does not end the enquiry. The questions here are, first, whether there exists a relevant customary law apart from the treaties invoked by Nicaragua. And, second, whether by virtue of the different natures and statuses of the two sources of law, this Court can properly adjudicate the customary law claims when the limitations contained in one party's consent to the Court's jurisdiction preclude it from applying the specific legal standards to which the parties have agreed in treaties in force between them.

From the narrowest perspective, the issue is one of judicial propriety, fairness and promotion of the rule of law, similar to many other considerations underlying the doctrine of admissibility, which Professor Moore will address this afternoon. The Governments of the United States and Nicaragua have specifically agreed on legal standards to govern their mutual rights and obligations in at least four treaties, including the Charter of the United Nations and the Charter of the Organization of American States. These treaties constitute the *lex inter partes*. The conduct of the two States will continue to be governed by these treaties, irrespective of what this Court may do on the customary law issue, because of the principle *pacta sunt servanda*. If there is a customary law separate from the treaties that is not merely duplicative of the treaties themselves — a topic to which I shall return — that law is certainly less specific than and, by hypothesis different from, the standards on which the parties have agreed in their treaties. Under these circumstances, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations are barred. The Court would be adjudicating these rights and obligations by standards other than those to which Nicaragua and the United States have agreed to conduct themselves in their actual international relations. Standards, I repeat, by which they will continue to be obligated to conduct themselves irrespective of a decision of the Court based on alleged general custom.

In its Counter-Memorial (**II**, paras. 314-315), the United States cited a broad range of authorities agreeing that, with respect to the use of force by one State against another, the United Nations Charter, particularly Article 2 (4), is the pre-eminent source of modern international law. Without exception these authorities, including two of Nicaragua's counsel, express the view that the Charter in this regard embodies customary and general international law.

Indeed, many authorities suggest that the Charter is a higher source of law that cannot be amended either by agreement between individual member States or by subsequent State practice but only by the specific amendment procedures of the Charter itself. Under this theory, it makes no sense to speak of a customary law, separate from the United Nations Charter, covering this same subject-matter. All modern customary law in this regard is rooted in and presupposes the Charter. All has evolved over the last four decades by reference to the Charter and could not change the Charter in any event. If one removes the Charter as a source of law for the adjudication of this customary claim, any residual elements of that law would necessarily fall with it. Since, *ex hypothesi*, the multilateral treaty reservation bars Nicaragua's Charter-based claims, it must equally bar any related custom-based claims.

Mr. President, the United States has no wish to engage here in a doctrinal debate on the nature and sources of international law. It is worth noting, however, that the two basic schools of international jurisprudence — recognizing this as a simplification, the positivists and the constitutionalists — would seem to concur that, if the Multilateral Treaty Reservation bars adjudication of Nicaragua's treaty-based claims, it bars all of Nicaragua's claims. The positivists would bar adjudication of Nicaragua's allegedly custom-based claims because that adjudication could not reach the legal standards actually agreed upon by the parties — the treaties as such. Constitutionalists would bar adjudication of the allegedly custom-based claims because the fundamental rules embodied in the underlying Charter norms cannot be applied.

Nicaragua attempts to circumvent these conclusions by contending that the United Nations Charter, or at least Article 2 (4) thereof, enjoys a dual existence; that the Charter is not only a treaty but also, and quite separately, customary international law. This is doctrinal sleight of hand.

Nicaragua suggests, rather tentatively, that Article 2 (4) was declaratory of pre-existing custom and cites Sir Gerald Fitzmaurice to the effect that a treaty declaratory of customary international law is simply duplicative of the obligations already binding on the parties. The view of Article 2 (4) as merely declaratory of pre-existing custom is, to say the least, unusual. Professor Brownlie cites only himself in this regard (p. 99, *supra*), and it is a great deal less than clear that the views of Professor Brownlie's treatise which he cites are supportive of his argument. We would refer the Court to Professor Brownlie's treatise, *International Law and the Use of Force by States* (1963), pages 279-280 — the pages cited in oral argument — and to page 113 and note 3 on that page. The United States believes it correct to state that virtually every major publicist on this topic agrees that, at the very least, Article 2 (4) was a major alteration of pre-existing law.

The view of Sir Gerald Fitzmaurice on the relation of treaties of codification to customary law is simply off the point. If there is a clear pre-existing customary obligation and a treaty merely declares it, the pre-existing but separate duty may well continue. It is a controverted doctrinal question which of the two sources, if either, would be pre-eminent. But the Charter was not a treaty of codification. It was a document drafted to create a new legal order, not to restate the old one, which had, twice in a generation, brought a world war.

The most striking feature of Nicaragua's argument is the conspicuous failure to identify customary international law with respect to the use of force apart from the Charter. Nicaragua's failure to specify the source of law which, it alleges, governs the issue between the Parties can only be construed as an implicit admission that there is no such source.

Nicaragua purports to reserve the right later to identify separate customary sources. But that time has come and gone. In hundreds of pages of written pleadings and hours of oral argument, Nicaragua has not identified an independent customary law basis for decision. Thus there is no customary law claim before the Court.

Most importantly, to give the Charter a dual existence and to say that claims based on it are barred as treaty claims but permissible as customary law claims is to vitiate the Multilateral Treaty Reservation entirely. The United States — and five other States with the same or similar reservations — intended to exclude from their acceptance of the Court's jurisdiction disputes based on multilateral treaties unless certain specified conditions were satisfied. The Court should not frustrate the clear intentions of six States by acquiescing in Nicaragua's doctrinal legerdemain.

The simple, undisputed fact here is that the Charter has been pre-eminent in this area for nearly four decades; to adjudicate claims of the unlawful use of force without reference to the Charter would be inconsistent with one of the most basic tenets of modern international law. And Nicaragua's claims of the unlawful use of force cannot be based on the Charter because of the Multilateral Treaty Reservation.

Mr. President, the United States and Nicaragua are bound by legal obligations, including the four treaties in question, whether this Court has jurisdiction or not. The United States has through the Court's Statute and the United States declaration accepted a limited, but not a general, jurisdiction of this Court to apply international law. Outside the scope of that declaration, the rule of law is applied in exactly the same manner as between and among the vast majority of States which do not accept the compulsory jurisdiction of this Court. The rule of law and the Statute of the Court require that the Court apply the declaration and its limitations in accordance with their terms, to take no more jurisdiction than was freely granted.

Mr. President, with your permission the United States will now briefly recapitulate our argument with respect to the Multilateral Treaty Reservation:

> That reservation bars adjudication of claims against the United States arising out of multilateral treaties and affecting other States parties to those treaties unless the other affected States are also before the Court.
>
> Nicaragua's claims arise out of multilateral treaties.
>
> The other Central American States are parties to these multilateral treaties and, by their own statements and the unavoidable implications of Nicaragua's pleadings, will be affected by any decision of this Court.
>
> Nicaragua's treaty-based claims are, accordingly, barred by the Multilateral Treaty Reservation.
>
> Nicaragua's ostensibly custom-based claims are substantively equivalent to and subsumed by, its treaty-based claims.
>
> When Nicaragua's treaty-based claims are barred by the Multilateral Treaty Reservation, the Court cannot adjudicate Nicaragua's custom-based claims because there is no separate basis in law for those claims; and because to do so would be to adjudicate by standards other than those by which the Parties have agreed to be governed in their international relations.
>
> Nicaragua's Application is, accordingly, barred in its entirety by the United States Multilateral Treaty Reservation.

Mr. President, I now have the great privilege and honour to introduce Professor Myres McDougal, Sterling Professor, Emeritus, at the Yale Law School, Professor of Law at New York School, and an esteemed friend and colleague. Professor McDougal will discuss the other aspect of the United States consent to this Court's jurisdiction, the United States note of 6 April 1984.

ARGUMENT OF PROFESSOR McDOUGAL

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Professor McDOUGAL: Mr. President, distinguished Members of the Court. It is an extraordinary honour to appear before this eminent Court on behalf of my Government upon issues of such high constitutional importance for the whole community of States.

THE COURT LACKS JURISDICTION BECAUSE THE UNITED STATES NOTE OF 6 APRIL 1984 TEMPORARILY SUSPENDS NICARAGUA'S CLAIMS FROM THE SCOPE OF THE UNITED STATES CONSENT TO THE COURT'S JURISDICTION

Introduction

Mr. Norton, Deputy-Agent of the United States, has explained that, as a result of a reservation in the United States original 1946 declaration, the Court lacks jurisdiction over Nicaragua's Application and the claims set forth therein.

It is my assignment to demonstrate that the United States note of 6 April 1984 effectively and lawfully suspends Nicaragua's present claims from the scope of the consent of the United States to the jurisdiction of the Court.

It will be recalled that on 6 April of this year, the United States, pursuant to Article 36 (4) of the Court's Statute, filed with the Secretary-General a note temporarily modifying the United States 1946 declaration. The United States note of 6 April stated that the United States suspended from its consent to this Court's compulsory jurisdiction, for a period of two years, disputes "with any Central American State" and disputes "arising out of or related to events in Central America". As the United States indicated shortly after the filing of the 6 April note, its purpose was to preclude Nicaragua from isolating for adjudication certain issues from the broader, multilateral issues under negotiation in the regional Contadora process. The United States 1946 declaration is otherwise unmodified and remains in full force and effect.

Nicaragua concedes that its claims come squarely within the terms of the 6 April note. Nicaragua disputes, however, the legal effectiveness of the United States 6 April note. Nicaragua presents alternative theories in this regard, according to whether or not the note is characterized as a modification or as a termination of the United States 1946 declaration.

Nicaragua concurs with the United States that the 6 April note is properly regarded as a modification. Since, however, the United States did not explicitly reserve in its 1946 declaration the right to modify that declaration, Nicaragua contends that the United States may not lawfully do so, and that the 6 April note is, consequently, legally ineffective.

Nicaragua presents, in the alternative, a number of arguments based on the assumption that the note is a termination of the 1946 declaration. Nicaragua makes these arguments in order to render applicable a provision in the 1946 declaration calling for six months' notice of termination. Nicaragua contends that, if the six-month notice proviso is applicable to the 6 April note, that note was not effective on 9 April when Nicaragua filed its Application.

It is my purpose to establish that the 6 April note is, in fact, legally effective whether construed as a modification or as a termination of the United States 1946 declaration.

The specific issue before this Court is whether a State may modify the terms of its acceptance of the Court's compulsory jurisdiction before another State has filed an application against it. It is common knowledge that the manner in which a State may limit or modify the terms of its acceptance of the Court's jurisdiction is not delimited in the Court's Statute but has evolved as a matter of State practice and Court decision. In practice, States have often reserved the right to modify or terminate their declarations at will and have exercised that right. The Court has expressly approved its practice in the *Right of Passage over Indian Territory* case, finding it not incompatible with the obligation to submit to compulsory jurisdiction. Some States have asserted and exercised a right of modification without having previously reserved that right, and there has been no effective protest. State practice and the fundamental principles expressed in the *Right of Passage* case authorize modifications in the absence of a reserved right. Though narrow, this issue is of obvious significance for the future jurisdiction of the Court and for the States that have bound themselves to that system of jurisdiction.

This case, thus, necessarily raises the broadest constitutional issues. This Court's jurisdiction ultimately rests on the consent of States and the expectation of States that their consent is subject to the principles of equality and reciprocity. In order to ensure that the consent of States to a given adjudication is genuine, this Court has held that the scope of their consent is to be determined as of the date an application is filed, the so-called "date of seisin". In accordance with this long-standing practice grounded in the principle that States must consent to the Court's jurisdiction, the lack of jurisdiction here is manifest. Before the date of seisin, the United States clearly and unequivocally indicated, in a note filed with the Secretary-General in accordance with Article 36 (4) of the Statute of the Court, that it did not consent to adjudication of Nicaragua's claims. If this case proceeds, it would, therefore, be a direct departure from the Court's long-standing principle that jurisdiction is determined as of the date of seisin. Further, it would be the first time in the 64-year history of this Court and its predecessor, that the Court has found compulsory jurisdiction in the face of a denial of consent made in advance of the filing of an application.

Reciprocity, in its broadest sense, and equal treatment, are, like consent, fundamental principles underlying the jurisdiction of the Court. The Court's Statute thus explicitly provides that each State accepts the Court's jurisdiction only with respect to States accepting "the same obligation". By this standard too, the validity of the 6 April note must be affirmed. Assuming, *arguendo*, that its declaration was binding, Nicaragua was entitled to modify or terminate that declaration with immediate effect. In accordance with principles of reciprocity and equal treatment, the United States must be similarly entitled vis-a-vis Nicaragua.

Thus, because it must deal with such fundamental aspects of compulsory jurisdiction, the Court's decision on the validity and effectiveness of the 6 April note may be expected to have profound effects on the rights and obligations of States that have already accepted that jurisdiction. The Court's decision may also be expected to affect the willingness of States to continue those obligations and the disposition of other States to accept new obligations.

Argument

For developing these themes in somewhat more detail, I propose to organize my remarks about five major points. In doing so, I will elaborate upon those aspects of the United States position that are most important and, in the view of the United States, decisive. It will become apparent that the contentions of the United States and Nicaragua rest on fundamentally different assumptions about the legal nature of declarations under the Optional Clause, including the nature of this Court's compulsory jurisdiction, and about the principles of international law that are appropriately applicable to the resolution of disputes about such declarations.

My five basic points are:

> First, declarations under Article 36 (2) are *sui generis* in nature; they are constitutional components of the Court's adjudicative process. They are not bilateral agreements between States.
>
> Second, because of the *sui generis* nature of declarations, and because of relevant State practice, the United States note of 6 April 1984 was a valid modification of the United States 1946 declaration.
>
> Third, because of the fundamental principles of reciprocity and equality that underlie this Court's compulsory jurisdiction, the 6 April note is valid particularly as against Nicaragua. This is true whether the note is regarded as a modification or a termination of the United States 1946 declaration, and whatever its status *erga omnes*.
>
> Fourth, the 6 April 1984 note is valid under United States law, and, hence, effective without question under international law.
>
> Fifth, and finally, the most fundamental policies in the common interest of all States require an adjudicative process based upon shared consent. These policies unmistakably point in the present case to an affirmation of the effectiveness of the United States 6 April note and, accordingly, to a dismissal of Nicaragua's Application.

It will be observed, as our argument unfolds, that we meet each of Nicaragua's arguments head-on and find all of its arguments either erroneous or irrelevant.

I. *We begin with our first major point: declarations under Article 36 (2) are* sui generis *components of the Court's adjudicative process*

Although Nicaragua acknowledges in its Memorial that a declaration does not establish an obligation equivalent to that of a treaty obligation, its contentions effectively equate the two. Nicaragua contends, in essence, that once a declaration is made, it may be modified or terminated, even before the date a claim is filed, only in accordance with the law of treaties. In his presentation of 9 October, Professor Brownlie continued this theme. He agreed that declarations are in some unspecified way different from international agreements, but he insisted that upon most major problems declarations must be subjected to the law of treaties, else chaos would result. And, in fact, on every problem that he addressed, Professor Brownlie insisted on a strict application of the law of treaties to declarations.

It is, however, incorrect and seriously misleading to assimilate the obligations established by declarations under the Optional Clause to treaties, and to regard such declarations as governed by the law of treaties. Declarations are not negotiated bilateral agreements but, rather, under Article 36 (2), unique components of the Court's adjudicative process. Declarations and treaties serve very different purposes and policies. Each must be interpreted and applied in the light of these different purposes and policies and by the criteria of a law responsive and distinctive to those differences. From the standpoint of the Court, declarations must, in particular, be read in the light of the fundamental constitutional policies — consent, equality and reciprocity — that underlie this Court's compulsory jurisdiction.

The differences in fact between declarations and agreements, which require a differentiated rather than a monolithic law, are evident from the manner in which declarations are made. Each declaration is drafted and filed with the Secretary-General unilaterally. In accordance with Article 36 (2) of the Statute, a declaration is immediately operative *ipso facto* on the date of filing. As this Court held in the *Right of Passage* case, a declaration is thus effective vis-à-vis other declarant States even before they have knowledge of the declaration. Under Article 36 (2) reservations to declarations are also immediately effective without the consent or agreement of other declarant States.

The resulting system of obligations bears little resemblance to the obligations established by treaties. There is no negotiation, no accommodation of mutual interest. Reservations are not subject to mutual agreement. The relevant obligations of the parties are fixed, not by agreement but rather by Article 36 (2) and the Court's interpretations of that Article to make effective its fundamental prescriptions of consent, equality and reciprocity. The scope of the obligations of States under the Optional Clause system — and, indeed, even the parties to the system — can vary from moment to moment without the knowledge of the parties themselves. The guiding feature of this system is thus not the carefully negotiated establishment of bilateral obligations but, rather, a delicate system of voluntary unilateral obligations by individual States.

It is indispensable to rational decision that we understand the complex, constitutional uniqueness of declarations under Article 36 (2) both as a matter of fact and in terms of the appropriate applicable law. Few scholars have been more incisive and comprehensive in perception of this uniqueness than Professor Shihata. After careful summary of the tremendous variety of opinion expressed by this Court and commentators, Professor Shihata wrote:

> "The confusion, it is appreciated, is due to the simultaneous existence of three elements in every relationship resulting from two declarations of acceptance:
>
> (1) The *unilateral* element which presents itself in the drafting of the declaration and which must be taken into consideration particularly in interpreting its terms;
>
> (2) The *bilateral* element which presents itself in the actual cases brought before the Court on the basis of declarations where jurisdiction will be established only to the extent to which the declarations of the parties coincide; and
>
> (3) The *multilateral* element which is based on the fact that each declaration derives its legal value from the Statute, and which leads to the assumption that in the absence of any evidence to the contrary declarations will be considered as made within the framework of the Statute.
>
> These three elements should all be given their full weight and effect in estimating with respect to each specific issue the possible attitude of the Court. The characterization of the relationship in terms of one of these elements to the exclusion of the others might facilitate the theoretical treatment of the subject but will hardly be consistent with the very nature of the Optional Clause System." (*The Power of the International Court to Determine Its Own Jurisdiction* (1965), p. 147; emphasis added.)

Similarly, Professor Rosenne makes a necessary distinction between jurisdiction established by bilateral agreement under Article 36 (1) and that established by adherence to the Statute under Article 36 (2). He writes:

> "The antithesis is between this automatic acceptance of jurisdiction for

the categories of legal disputes mentioned in Article 36 (2) on the one hand, and on the other hand the limited acceptance of jurisdiction for cases or matters defined (relatively or absolutely) which results either from a special agreement in the technical sense or from a compromissory clause in a treaty or convention in force, a matter that comes under Article 36 (1). The difference between the two lies in the method of defining the scope of the jurisdiction conferred on the Court. In cases coming within the compulsory jurisdiction, the scope of the jurisdiction, *ratione personae* and *ratione materiae*, is governed by the complex, variable and delicately balanced system of declarations interconnected through Article 36 (2). In the other cases, the scope of the jurisdiction is confined within relatively stable limits determined by the title of jurisdiction exclusively, which itself is the product of the normal process of treaty-making. That process of treaty-making includes a phase of negotiation. That phase is absent as regards the compulsory jurisdiction, where the contractual relations are established automatically, '*ipso facto* and without special agreement', so that the terms on which a State recognizes the compulsory jurisdiction are not a matter for negotiation." (*The Law and Practice of the International Court*, 1965, p. 370; emphasis added; footnotes omitted.)

In final example, Professor Briggs, though he overemphasizes the consensual aspects of declarations before the date of seisin, appropriately indicates some of the relevant constitutional policies in his description of the nature of declarations:

> "A declaration accepting the compulsory jurisdiction of the Court pursuant to Article 36 (2) of the Statute is not a contractual engagement undertaken by the declarant State with the Court. It is in the nature of a general offer, made by declarant to all other States accepting the same obligation, to recognize as respondent the jurisdiction of the Court, subject to the limitations specified in the offer. The declaration is not even communicated by declarant to the Court, but to the Secretary-General of the United Nations who registers it as an international agreement in the *United Nations Treaty Series*.
>
> Since a declaration is a unilateral act making an offer, it must be related to the unilateral declaration of another State. The jurisdiction of the Court in any case arising under Article 36 (2) finds its foundation and limitations in the common ground covered by applicants' and respondents' declarations as determined by application of the condition of reciprocity implied from the words 'accepting the same obligation'.
>
> The purpose of the statutory condition of reciprocity is to establish the equality of the parties before the Court — an elementary requirement of justice." ("Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", Hague Academy, *Recueil des cours*, 1958, Vol. 93, p. 223, at p. 245; footnotes omitted.)

In the light of this distinctive constitutional nature of declarations under Article 36 (2), it is a grotesque miscalculation of common interest to insist upon the application to these declarations of a body of law designed for a completely different set of activities and for completely different community policies. There need be no wasteland or chaos if an international law, more appropriate than the historical law of treaties, is developed for resolving problems about declarations in terms of common interest. Happily, this Court has been engaged for some decades on the development of such law, and it has the opportunity in this case to continue that development.

II. Our second major point, building upon the first, is: the 6 April note was a valid modification of the United States 1946 declaration with immediate effect

It may be noted at the outset that the Statute of this Court, like that of its predecessor, makes no provision by its terms for the making of reservations to an acceptance of the Court's compulsory jurisdiction. Yet, despite the absence of textual authority, States almost immediately began qualifying their declarations with a wide range of reservations and the right to make these reservations is now regarded as thoroughly established by practice and the decisions of this Court. This right to limit the scope of acceptance, as we noted in our Counter-Memorial (**II**, p. 107), derives not from the terms of the Statute but from a principle implicit in the consensual nature of the Court's jurisdiction and in the political reality that if sovereign States are to accept the Court's jurisdiction they must be free to limit their acceptance. This is what former President Jiménez de Aréchaga referred to as the principle of *in plus stat minus*.

It may be remembered, Mr. President and distinguished Members of the Court, that the argument of Nicaragua that the United States may not, without six months' notice, modify or terminate its 1946 declaration is built upon the double assumption that declarations are, with respect to matters of modification and termination, subject to the international law of treaties and that that law provides that treaties in relation to judicial settlement may not be modified or terminated except in accord with their terms or by mutual consent. It follows that if Nicaragua is wrong about either half of this assumption, its whole argument, like the proverbial house of cards, comes tumbling down. It has already been demonstrated by the United States that it would be inept to attempt to apply to declarations, so constitutionally different from ordinary treaties, a law of treaties designed for completely different purposes.

I now propose to outline a developing international law, fashioned in specific relation to declarations by practice and Court decision, which honours modification and termination if exercised before the filing of an adversary claim, and to establish that the international law of treaties, when properly understood, even if assumed to apply to declarations, does not preclude such modification and termination.

The *sui generis* character of declarations is directly recognized, and expressed, in the practice by which they have historically been modified and terminated by declarant States. Of immediate relevance here is the widespread practice of States reserving the right either to modify their declarations with immediate effect or to terminate and substitute new declarations, also with immediate effect. Twenty-seven of the 46 States with declarations now in force and I do not include Nicaragua in these numbers have either or both of these types of reservations. Thus, a large majority of the States now participating in the compulsory jurisdiction system are entitled by the terms of their declarations to modify the scope of their acceptance of this Court's jurisdiction with immediate effect.

States have, moreover, frequently exercised these rights. In literally dozens of cases States have terminated existing declarations and substituted new declarations excluding matters that came within the scope of their prior declarations. It only confirms the importance which States attach to these rights to note that in a number of instances such action was taken with the specific intention of avoiding potential applications.

States have also modified or terminated their declarations in the absence of reserved rights to do so. Thus, Columbia in 1936; Paraguay in 1938; France, the United Kingdom and five British Commonwealth States in 1939; El Salvador in 1973; and Israel in February of this year; all modified or terminated existing declarations without a reserved right to do so. Only limited objections to these actions were made. Indeed, with the exception of a Honduran objection to El Salvador's 1973 action, there have been no objections by States to such modifications in the absence of a reserved right in the last 45 years. Professor Brownlie has raised many questions about these instances of modification and termination in the absence of an explicitly reserved right, and cited Sir Humphrey Waldock in support of his views. It would not appear, however, that his questions affect the importance of these precedents in shaping community expectations about future decision. As I shall discuss in a moment, moreover, Professor Waldock revised his opinion on the amenability of declarations to modification or termination. Based on some of the historical examples cited by the United States, Sir Humphrey concluded that declarations are inherently subject to modification and termination. (*Yearbook of the International Law Commission*, 1963, Vol. 2, p. 68.) I will come to these views in a few moments.

The Court itself has endorsed this practice, in so far as explicitly reserved rights are concerned, in the *Right of Passage over Indian Territory* case. The Court's reasoning in that case is central to the present dispute, and a detailed consideration of it is therefore warranted.

Portugal, in making a declaration under Article 36 (2) of the Court's Statute, had reserved the right to modify the scope of that declaration at any time with immediate effect. The Court held, consistent with its earlier decisions, that the obligations of two parties become fixed toward one another under the Optional Clause upon the date an application is filed, the so-called "date of seisin". The Court observed:

> "As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 143.)

I would emphasize "when a case is submitted to the Court".

The Court recognized that the Optional Clause system has an inherent degree of uncertainty in the scope of each declarant's acceptance of compulsory jurisdiction at any given time. The Court indicated, however, that the scope and effect of the relationship between declarant States is variable at all times until the date of an application. On that date, and only on that date, the elements of jurisdiction expressed in the declarations of the parties then in force, as well as rights of further modification or termination, are effectively frozen in respect of that case. The Court found such a system retained its compulsory character, while affording States the flexibility and the equality that lies at the heart of the consensual nature of the Article 36 (2) regime.

The basic argument of Professor Brownlie in relation to the 6 April 1984 note is, it will be remembered, that declarations constitute, even before a claim is filed, some kind of an indenominate consensual relationship that is subject to the law of treaties and that that law forbids the unilateral modification or termination of all treaties. This argument runs flatly in the face of the general recognition, as illustrated in Article 56 of the Vienna Convention on the Law of Treaties, that some types of treaties are by their nature subject to unilateral termination or withdrawal. It may be helpful to refer to the discussion of this problem during the preparation of the International Law Commission draft of the Vienna Convention on the Law of Treaties. As several Members of the Court may recall from personal experience in the drafting of that Convention, one important question that arose was the terminability of treaties that have no provision for termination.

Some participants in the preparation of the Convention originally thought that treaty obligations can and should exist in perpetuity unless the treaty itself provides for termination. Their presumption was that, in the absence of a provision for termination, the parties intended their obligations to be perpetual. Other participants in the drafting process, however, objected that certain treaties should be considered terminable by their very nature. Prominent among such treaties, they contended, are (1) treaties agreeing to arbitration, conciliation or judicial settlement, and (2) constituent instruments of international organizations, international governmental organizations, with no express provision for withdrawal. Indeed, an early draft of the Vienna Convention expressly included both of these categories of treaties among those that were to be considered terminable by notice.

In 1963, the Special Rapporteur for the Commission, Sir Humphrey Waldock, after examination of various types of treaties and review of conflicting opinion, made the finding that "it is doubtful how far it can be said today to be a general rule or presumption that a treaty which contains no provision on the matter is terminable only by mutual agreement of the parties". He asserted that the relevant international law established that some treaties are terminable by their nature. In summary, in total revision of his much-cited article of 10 years earlier in the *British Year Book of International Law*, he made reference by analogy and I emphasize by analogy to declarations under the Optional Clause and he concluded:

> "Taken as a whole, State practice under the Optional Clause, and especially the modern trend toward declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that these treaties are regarded as essentially of a terminable character. Regrettable though this conclusion may be, it seems that this type of treaty ought, in principle, to be included [among the treaties terminable by nature]." (*Yearbook of the International Law Commission*, 1963, Vol. 2, p. 36, at p. 68.)

If State practice under the Optional Clause can be drawn upon to confirm the terminability of treaties relating to arbitration, conciliation, and judicial settlement, that practice must assuredly import the element of lawful modification and termination. The message in Latin of *a fortiori* and of President Jiménez de Aréchaga's *in plus stat minus* would appear to be entirely relevant.

The same conclusion necessarily flows from Sir Humphrey Waldock's discussion of the inherent terminability of the constituent instruments of international governmental organizations. In describing the outcome reached with respect to the United Nations Charter, he wrote, again in 1963 as Special Rapporteur of the International Law Commission:

> "At San Francisco, although differing views were expressed during the discussion, the Conference ultimately agreed that a Member of the United Nations must be free in the last resort to withdraw from the Organization. While omitting any denunciation or withdrawal clause from the Charter for psychological reasons, the Conference adopted an interpretative declaration which included the following passage:
>
> [This is from the Charter:]
>
> 'The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the

> Organization. The Committee deems that the highest duty of the nations which will become Members is to continue the co-operation with the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization.'"

This one example should set to rest the myth that all treaties, whatever their nature, are terminable only by mutual consent. It is familiar knowledge that the Statute of the Court, including its component obligations, are now a part of the comprehensive United Nations system. If the authors of the Charter in 1945 and the Special Rapporteur of the International Law Commission in 1963 thought there was inherent power to withdraw from the Charter itself, surely they thought that a modification or termination of participation in the Optional Clause system was authorized.

The positions that declarations are modifiable and terminable, before the filing of claims, comports, we would suggest, most with common sense. It is not, we submit, reasonable to presume that, when a State makes a declaration under Article 36 (2), it intends thereby to bind itself in perpetuity or indefinitely, irrespectively of the date of filing claims, except to the extent that it has made reservations. Such a construction would make a prison of the Optional Clause system. As a former Legal Adviser of the League of Nations, Emile Giraud, said:

> "If a State is free to bind itself or not, it must logically be able to unbind itself. Otherwise, these obligations would be prisons, and this would dissuade States from any desire to become parties."
>
> ["Si un Etat est libre de s'engager ou de ne pas s'engager, il doit logiquement pouvoir se dégager. Autrement les conventions seraient des conventions prisons et ce caractère serait fait pour enlever aux Etats le désir d'y devenir parties."] (*Annuaire de l'Institut de droit international*, 1957 Vol. I, pp. 281-282.)

It is precisely such a "prison" to which Nicaragua's argument leads. We submit that those States that have accepted the compulsory jurisdiction of the Court without a reserved right of termination or modification and without a specified duration would be surprised to learn that, under Nicaragua's theory, they are bound for ever. If this be the law, moreover, what responsible legal adviser would now advise his government to make such a declaration?

In the light of the Court's decision in the *Right of Passage* case, long-standing State practice under the Optional Clause, and theoretical analyses of declarations such as those by the International Law Commission and others, a number of publicists have concluded, we submit rightly, that declarations are subject to modification or denunciation at any time before an application is filed.

Thus Professor Rosenne observes:

> "When a State deposits a declaration under Article 36 (2) of the Statute, it makes a general offer to all other States doing likewise, to recognize as defendant the jurisdiction of the Court in a future concrete case, and on the terms specified . . . The terms upon which that offer is made are not constant, but consist in the area of coincidence with the terms of like declarations made, or to be made, by other States . . . There is, as yet, no element of direct agreement between any of the States making declarations. That agreement will only come about when a legal dispute is concretized by filing of an application. That step alone sets the process of compulsory adjudication

> in motion." (*The Law and Practice of the International Court*, Vol. I, pp. 413-414.)

The Court adjourned from 11.30 to 11.45 a.m.

Mr. President, at the break I was reviewing academic scholarly authority that supports the inherent right of modification or termination of a declaration. I have only one more example.

Similarly, Professor Shihata concludes as follows:

> "[E]ven in [the realm of theory] the insistence on applying the rules relating to the termination of treaties, and therefore of invalidating any unilateral termination not anticipated in the instrument, is not always justified. It has been explained before that the 'bilateral element' is not the only element in the relationship created by the declarations of acceptance, and that this element becomes particularly important only after the seisin of the Court of a given case. All agree that a unilateral termination will then have no effect on the Court's jurisdiction. Before the Court is seised, however, the vague relationship between each two declaring States, with its three elements [unilateral, bilateral, and multilateral] present, can hardly be called a treaty subject to the rules governing the termination of treaties. If the application of such rules is found 'desirable' as it results in widening the Court's scope of continued jurisdiction, it may at best be suggested as an instance of the 'should be' as compared with the 'is' in the realm of international adjudication." (*The Power of the International Court to Determine Its Own Jurisdiction*, 1965, pp. 167-168.)

A final factor in respect to this major point of modification and termination is that it is most irrational to consider the problems of modification and termination as if time had stood still since 1920. In the early years of this century it was the deeply held aspiration of many people that a comprehensive system of compulsory adjudication could be created in which it would be a fact, as the Agent for Nicaragua demanded in this case, that when a plaintiff State made a claim to the Court, a defendant State would be required to respond. As Professor Brownlie writes in the second edition of his treatise on international law (p. 724): "The expectation was that a general system of compulsory jurisdiction would be generated as declarations multiplied." It was from the perspective of this aspiration and expectation that the monographs of Briggs and Waldock (in Waldock's earlier view), and the books and articles that paraphrase the earlier Waldock, were written. The realities of the contemporary world are all now known to be completely different. There has in fact been such a fundamental change in the possibilities of achieving a comprehensive system of a genuine compulsory jurisdiction as to suggest that Article 62 of the Vienna Convention on the Law of Treaties has become relevant. The States making declarations without explicitly reserving rights to modify and terminate did not foresee the defeat of their generous expectations. Many States, including the United States, made expansive declarations in the hope that the high goals of compulsoriness and comprehensiveness might become a reality. The fact that the vast majority of other States have not made comparable declarations has completely transformed the character of the obligation undertaken. If States making declarations are to be subjected to the law of treaties, they should at least be accorded some of the benefits of that law, including those of the doctrine of *rebus sic stantibus*. Common interest and the fundaments of equality require no less.

III. Our third major point, building cumulatively, is: reciprocity requires that the 6 April note be deemed effective as against Nicaragua, whatever its status erga omnes

In common opinion, celebrated in many decisions of this Court, the principle of reciprocity is one of the most fundamental policies embodied in Article 36 (2) of the Statute of this Court. It may be emphasized that Article 36 (2) itself binds a declarant State only "in relation to any other State accepting the same obligation". In reiteration, far from "otiose" in the light of Professor Brownlie's pleading, the United States declaration of 1946 binds only in regard to States "accepting the same obligation". It is axiomatic under the principle of reciprocity, so deliberately provided, that each declarant State under the Optional Clause is entitled to invoke the rights, conditions and limitations enjoyed by another declarant State against the asserting declarant State. The function of the principle of reciprocity, as Professor Briggs indicates in the passage quoted above, is to equalize the obligations of States and to make certain that jurisdiction is based upon genuine consent. This principle of reciprocity is not, as Professor Brownlie insists, a vague and ambiguous effusion from his indenominate consensual relation, but rather one of the most fundamental and cherished constitutional principles of international law since the rise of the State system.

Whatever the status *erga omnes* of the six-month notice proviso, it is not a binding obligation between the United States and Nicaragua. If any fact is clear in this controverted case, it is that Nicaragua has not accepted "the same obligation" as the United States in its 1946 declaration. It is, in any event, not necessary to repeat here the detailed documentation we have offered above and in our current Counter-Memorial that States that actually brought into force the kind of declaration that Nicaragua asserts in its 1929 communication have a right of unilateral modification or termination at any time before seisin. We here incorporate that earlier documentation by reference. In brief, assuming that Nicaragua's claimed 1929 declaration has any legal effect, that effect cannot be to bind Nicaragua in perpetuity to an unconditional acceptance of this Court's compulsory jurisdiction.

There is, then, in this regard, a basic lack of reciprocity in the situation of the two Parties: Nicaragua is able to terminate or modify its declaration at will. The United States is obligated, so it is argued, to terminate its declaration only upon six-months' notice. Because of this basic lack of reciprocity, the United States six-months' notice provision is not binding vis-a-vis Nicaragua whatever its relevance with respect to other States.

The reasoning that leads to this conclusion was perhaps most elegantly stated by Sir Humphrey Waldock in the 1955 article in the *British Year Book of International Law*, that Nicaragua has repeatedly cited in this case. In a passage already quoted by the United States in its Counter-Memorial, Sir Humphrey wrote:

> "Reciprocity would seem to demand that in any given pair of States, each should have the same right as the other to terminate the juridical bond existing between them under the Optional Clause . . . The inequality in the positions of the two States under the Optional Clause, if the principle of reciprocity is not applied to time-limits, becomes absolutely inadmissible when State A's declaration is without time-limit while that of State B is immediately terminable on notice to the Secretary-General. It would be intolerable that State B should always be able, merely by giving notice, to terminate at any moment its liability to compulsory jurisdiction vis-a-vis State A, whilst the latter remained perpetually bound to submit to the

> Court's jurisdiction at the suit of State B. The Court has not yet had occasion to examine this aspect of the operation of reciprocity in relation to time-limits. *In light, however, of its interpretation of the condition of reciprocity in regard to reservations, the Court, it is believed, must hold that under the Optional Clause each State, with respect to any other State, has the same right to terminate its acceptance of compulsory jurisdiction as is possessed by that other State.*" ("Decline of the Optional Clause", *British Year Book of International Law*, 1955, Vol. 32, p. 254, at pp. 278-279.)

The eminent Indian scholar, Professor Anand, endorsed this view of Waldock and observed:

> "To allow a State, on the ground of reciprocity in regard to time-limits, the right to terminate its obligations under the Optional Clause with reference only to a particular State or States may add to the complexity of the Optional Clause system. To refuse it such a right would, on the other hand, be to establish gross inequality between States in regard to termination of their obligations under the Optional Clause." (*Compulsory Jurisdiction of the International Court of Justice*, 1961, p. 186.)

In terms of fact, and of right, one may analyse this situation from the perspective of either Nicaragua or the United States. Nicaragua has not accepted an obligation to terminate its declaration only upon six-months' notice. Since States making declarations under Article 36 (2) of the Statute only do so with respect to other States undertaking the "same obligation", Nicaragua has not established a binding obligation vis-à-vis the United States in this regard. Nicaragua may not, therefore, invoke the obligation of the United States against the United States. Only States that have adopted the same or similar obligations may do so. It may be noted that there are a number of other such States.

Alternatively, despite Professor Brownlie's unsubstantiated objections, one may look at the facts from the standpoint of the United States. Nicaragua has the right to terminate or modify its declaration with immediate effect. In accordance with the generally accepted principles of reciprocity, mutuality and equality of States before the Court, the United States is entitled to exercise the same right vis-à-vis Nicaragua.

In his pleading, Professor Brownlie sought to equate under the one label "time-limits" both provisions about "duration" and "express reservations" concerning modification and termination and to establish that the principle of reciprocity does not apply to "time-limits" so ambiguously defined (pp. 73-74 *supra*). This is to employ confusion to beg the question. The factual reference of (1) provisions about duration and (2) express reservations of rights to modify and terminate is of course quite different, and the relevant legal policies are equally different. These differences are not, unhappily, completely clear in the long quotation from Professor Rosenne which Professor Brownlie invokes. The reservation of rights to modify and terminate an obligation refers to the total existence of an obligation and not merely to some specification of duration.

The complete refutation of Professor Brownlie's position is offered in the United States Counter-Memorial and in a passage from the Judgment of this Court in the *Right of Passage* case. In the Counter-Memorial, we wrote as follows:

> "In the *Right of Passage* case, India argued that it should have been entitled to exercise vis-à-vis Portugal that State's reserved right to modify its declaration on notice to exclude particular categories of disputes. The Court ruled that since, as of the date of the seisin of the Court, India had not exercised such a right, it was not entitled to do so subsequently. This

> was no more than an affirmation of the rule in *Nottebohm* that the seisin of the Court may not be affected by subsequent acts. The Court simply did not address whether a modification by India *before* the date of filing of the Application would have been effective because of the reciprocal effect of Portugal's reservation." (**II**, para. 419.)

I should like to quote from the passage of the Court to make this completely clear. In the Judgment the Court wrote:

> "It has been argued that there is a substantial difference, in the matter of the certainty of the legal situation, between the Third Portuguese Condition and the right of denunciation without notice. In the view of the Court there is no essential difference, with regard to the degree of certainty, between a situation resulting from the right of total denunciation and that resulting from the Third Portuguese Condition which leaves open the possibility of a partial denunciation of the otherwise subsisting original Declaration.
>
> Neither can it be admitted, as a relevant differentiating factor, that while in the case of total denunciation the denouncing State can no longer invoke any rights accruing under its Declaration, in the case of a partial denunciation under the terms of the Third Condition Portugal can otherwise continue to claim the benefits of its Acceptance. For, as the result of the operation of reciprocity, any jurisdictional rights which it may thus continue to claim for itself can be invoked against it by the other Signatories, including India.
>
> Finally, as the third reason for the invalidity of the Third Condition, it has been contended that that Condition offends against the basic principle of reciprocity underlying the Optional Clause inasmuch as it claims for Portugal a right which in effect is denied to other Signatories who have made a Declaration without appending any such condition. The Court is unable to accept that contention. It is clear that any reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relation to other Signatories of the Optional Clause. If the position of the Parties as regards the exercise of their rights is in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt by the other Signatories, that delay operates equally in favour of or against all Signatories and is a consequence of the system established by the Optional Clause." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 143-144.)

Clearly in the opinion of the Court the principle of reciprocity has application to rights of modification and termination. Such rights are of course wholly beyond any question of simple duration, components of the very existence of an obligation.

IV. Our fourth major point is: the 6 April 1984 note is valid under United States law and hence effective without question under international law.

In his pleading on 9 October Professor Chayes argues that it is a "massive fact" that the plenary powers of the President, as whose agent Secretary Shultz acted in the 6 April 1984 note, are not adequate "to undertake or vary major international obligations of the United States" and that this inadequacy constitutes a "manifest" defect under Article 46 of the Vienna Convention on the Law of Treaties. This comes as a surprising argument, since it is inconsistent with

Professor Chayes's own publicly expressed views in 1979 and earlier and since judicial developments since 1979 have established beyond serious dispute that there is no basis to Nicaragua's argument.

The short answer to Professor Chayes is twofold: first, Article 46 of the Vienna Convention has nothing to do with the problem before this Court and, secondly, there is not only no manifest defect in the Secretary of State's authority to issue the declaration under the United States constitutional structure; indeed, there is no defect whatsoever.

With reference to the first point, Nicaragua's reliance on Article 46 of the Vienna Convention on the Law of Treaties is totally misplaced. Neither the 1946 declaration nor the 6 April note modifying that declaration are treaties of the kind for which the Vienna Convention was designed and is applicable. Article 46, further, prevents the United States from denying the validity of the 6 April 1984 note, unless there is a manifest violation of domestic law. It does not purport to give any affirmative right to Nicaragua to challenge the domestic authority asserted by the United States to terminate or modify its declaration. In fact, Article 46 has nothing at all to do with the modification or termination of a treaty; it relates only to the making of a treaty.

With reference to the second point, if the treaty-making power of the United States is relevant, the Constitution of the United States places that power in Article II of the Constitution, delineating the Executive's power. To be sure, the making of a treaty, as distinguished from Presidential and Congressional-Executive agreements, is subject to the advice and consent of the Senate. The Constitution is, however, silent as to the modification or abrogation of international agreements.

The flow of judicial decisions in the United States nonetheless supports the Executive Branch's actions here. The United States Supreme Court has referred to the President, as Head of the Executive Branch, "as the sole organ of the Federal Government in the field of international relations" (*United States* v. *Curtiss-Wright Export Co.*, 299 US 304, pp. 319-320 (1936)). Based on that proposition the Supreme Court has also held at least twice that it is the Executive Branch of the United States Government that makes a binding determination for purposes of United States domestic law on whether the terms of a particular treaty remain in effect (*Charlton* v. *Kelly*, 229 US 447 (1913); *Terlinden* v. *Ames*, 184 US 270 (1902)). In the only domestic litigation where the issue of the Executive's authority to terminate treaties was directly raised — litigation not even mentioned in Nicaragua's oral argument in April or in its Memorial — the President's action in terminating the mutual defence treaty with Taiwan was not judicially invalidated, as Professor Chayes would appear to have insisted. While it is true that in *Goldwater* v. *Carter* (444 US 996 (1979)), the Supreme Court held that the challenge to the President's authority was "non-justiciable", that is beyond challenge within the courts of the United States, not a single justice expressed any doubt as to the President's authority to terminate the treaty, and President Carter's termination remained effective. Moreover, prior to the Supreme Court's non-justiciable decision, five out of the eight members of the United States Court of Appeals for the District of Columbia circuit specifically held on the merits of the question that the President had the authority to terminate the treaty with only a single judge disagreeing on the merits (*Goldwater* v. *Carter*, 617 F. 2d 697 (DC Cir. 1979), *Vacated on other grounds*, 444 US 996 (1979)).

Moreover, based on the structure of the Constitution and because the termination of a treaty or suspension of certain provisions involves the assumption of no new obligations on behalf of the United States, the view of United States legal scholars has been overwhelmingly to support the President's authority to terminate treaties without requiring any Senate action. Thus, Professor Louis Henkin, the immediate past co-editor of the *American Journal of International Law*, has said that the Senate does not have "any authoritative voice in interpreting a treaty or in terminating it" (*Foreign Affairs and the Constitution*, 1972, p. 136). Similarly, Professor Laurence Tribe of Harvard has said that the President "has exclusive responsibility for . . . terminating treaties and executive agreements" (*American Constitutional Law*, 1978, pp. 164-165). Even Professor Chayes in testifying before the Senate Committee on Foreign Relations in 1979 stated:

> "The structure of the overall distribution of the foreign affairs power, then seems, at least on first appraisal, to argue for the existence of an independent Presidential initiative in treaty termination."

He went on to say:

> "Senatorial partisans argue for concurrence by two thirds of the Senate, just as with advice and consent to treaties. That sounded unnatural to me when I first heard it, and it sounds only slightly less so now, after I've thought about it for a while." (*Hearings on Treaty Termination before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 311 (1979).) (See also *ibid.*, at 341-358 (Statement of former Legal Adviser Leonard C. Meeker); 284-287 (Statement of former Assistant Secretary of State William D. Rogers); 400-413 (Statement of Professor John Norton Moore).)

These statements are supported by the historical record with respect to treaty terminations by the United States. Although in a number of cases Congress or the Senate has concurred in the President's termination of treaties, there are at least a dozen examples where treaties were terminated solely by the action of the Executive Branch (see *Hearings on Treaty Termination, op. cit.*, at 156-191). There are no examples where the President has terminated a treaty and the Congress or the courts have subsequently invalidated the termination. Some 40 years ago I wrote a long article in the *Yale Law Journal* collecting many instances in which the President acted alone to terminate or modify all kinds of international agreements (McDougal and Lans, "Treaties and Congressional-Executive or Presidental Agreements", 54 *Yale Law Journal*, 181, 534 (1945)). What this historical practice demonstrates without question is that treaty obligations of the United States cannot be maintained in effect absent the continued concurrence of the Executive Branch. As Professor Chayes has said:

> "To my mind the most important thing that a review of the practice reveals is that there has been no uniform practice. The record shows all sorts of combinations and permutations of Presidential and Congressional action; and it shows some instances of action by the President alone. In all these cases, and whatever the form chosen, the action has been regarded as effective by our treaty partners, by the Executive Branch, by the Congress so far as appears, and, in the few peripheral instances already referred to, by the courts." (*Hearings on Treaty Termination, op. cit.*, at 311.)

While there may have been some debate in the United States as to the President's authority to terminate treaties, the governing authorities and the Supreme Court's non-justiciability holding in *Goldwater* v. *Carter* make clear that there has not been a "manifest" violation of a rule of internal law which could justify this Court, under Article 46 of the Vienna Convention, in ignoring the conclusive effect of the Executive Branch's 6 April 1984 letter. Should Professor Chayes carefully read the sequence of opinions in *Goldwater* v. *Carter*, effectively putting the President's actions beyond any legal challenge, he would have the answer to his insistent demand to know why the Executive Branch today takes the position that it does.

V. *Our final major point, in summary, is: the most fundamental policies in the common interest of all States require an adjudicative process based upon shared consent*

It has been observed in our discussion above that the basic constitutional structure of Article 36 (2) that has developed is, not the automatic, comprehensive system of wholly compulsory jurisdiction for which many people once aspired, but rather a system of delicately balanced concurrent unilateral offers in which States express their consent to be bound to "the same obligation" under conditions of equality and reciprocity. This Court has clearly fixed the date at which obligation becomes irreversible, that is, not subject to modification or termination. This date is not at the time of unilateral declaration, but at the date at which a claim is filed, thereby creating the first bilateral obligation as of that date, after which rights cannot be changed to the detriment of a filing State. For making certain that the fundamental constitutional policies of consent and the equality of States are zealously safeguarded, this Court has insisted upon a comprehensive, common-sense conception of "the same obligation", that insures that a genuine, precise coincidence of obligation is imposed upon the parties as of the date of seisin. Prior to that date there is little advance commitment and little realistic expectation of such commitment.

It appears to require emphasis, however, that this contemporary constitutional structuring of Article 36 (2) does not exhibit any lack of legal framework or constitute a wasteland. The spokesmen for Nicaragua insist that the only way to establish a legal framework for Article 36 (2) is through contract. Thus, Professor Brownlie states:

> "The legal régime of the Optional Clause . . . is not subject to the law of treaties as such, but it does remain subject to those essential legal principles applicable to contractual relations." (P. 69, *supra*.)

This ignores that the concept and law of "constitution" is equally as old, and equally as important, as the concept and law of "contract". The notion that the aspiration to achieve a specific allocation, particular and limited, jurisdictional powers to particular institutions and, then, carefully to balance such powers among different institutions, the notion that this began with the written United States Constitution is uninformed. The basic aspiration and concepts are at least as old as the early Greeks and were developed by such writers as Polybius, Cicero and Montesquieu. The law of contracts is not the only source of a legal framework and policies. The policies of consent, equality and reciprocity, and of a decent respect for the allocation of competences among different institutions, are as important as those of offer and acceptance and are indispensable components, in the most fundamental sense, of the contemporary constitution of States.

It would appear, further, that there is no reasonable alternative to this Court's decision that the date when a claim is filed, the date of seisin, is the appropriate date beyond which the termination or modification of declarations become impermissible. Professor Brownlie insists that there is no "necessary" connection between rights to modify and terminate and the date of seisin, but he offers scant reason for choice of the date of declaration. His demand for the fixing of that date is in contradiction of his emphasis upon contract law. Under contract law there is no "contract" until there is shared commitment in offer and acceptance. He suggests that a declaration has its own unique "integrity", but the only content he ever specifies for that integrity is the question-begging assumption that it is not modifiable or terminable. He asserts that the "right to modify a declaration must be reserved at the point of commitment, that is, when the declaration is made and the system of the Optional Clause is entered" (p. 69, *supra*). Astonishingly, he states that this Court in the *Right of Passage* case "regarded the point of commitment as the date on which a State deposits its declaration of acceptance" (p. 69, *supra*). The Court in its opinion, as we saw, made it entirely clear that the date of commitment was that of the date of seisin. In this context, no good reason would appear why States who make a lesser commitment to the jurisdiction of the Court should be honoured in expectations that they may take advantage, before the date of seisin, of the declarations of States which make larger commitments. Any other conclusion would violate the basic constitutional principle of equality.

In order to criticize the United States position that it has a right to modify or terminate a declaration up to the date of seisin, Professor Brownlie imputes to the United States — at great length — an argument we do not make. He contends that the United States claims a right to modify after seisin. But, of course, we make no such claim. We acknowledge, in accordance with the Court's jurisprudence that the United States is bound as of the date of seisin; but we also argue, again in accordance with the Court's rulings, that until that date the scope of our consent may be modified. This is what we mean by an inherent right.

It is by the principle of reciprocity, applied with comprehensive reference to secure a full coincidence of the parties' obligations at the date of seisin, that this Court has traditionally protected the equality of States and the consent of States. Professor Brownlie insists that the "concept of reciprocity is based instead upon a contractual concept which provides the framework within which States may choose to make commitments and thus to take risks" (p. 76, *supra*). He insists that it is the "element of choice which represents the notion of fairness as an element of reciprocity". He finds that reciprocity is little more than a "metaphor" for the consensual process he postulates. He nowhere explains, however, why fairness should not require a genuine equalization of the obligations of the parties or why this substantial fairness in fact of burden should be made to yield to a fantasized "freedom of choice". It should require no further demonstration that a law of contract can give no adequate protection to the basic constitutional policies of consent, equality and reciprocity.

In these proceedings, Mr. President and distinguished Members of the Court, much has been said about the rule of law — some of it not wisely. I should like to make my own contribution by suggesting that constitutional rules about jurisdiction are just as important as any other rules, even the rules of contract law. It is not a move from reason to power as the Agent of Nicaragua has suggested, to insist upon the importance of the observance of constitutional rules. It is the responsibility of the highest custodians of our hard-won heritage of international law, as the Agent of the United States has suggested, to make a judicial decision carefully within the constraints of that law, if adjudicative process is to be maintained and enhanced.

In conclusion, Mr. President and Members of the Court, I would thank you for your courteous attention to my remarks and for their further consideration. It is my respectful submission that the United States, acting within the bounds of its rights, has not submitted to the jurisdiction of this Court and should not have jurisdiction imposed upon it.

STATEMENT BY MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Members of the Court, may it please the Court.

THE ADMISSIBILITY OF THE APPLICATION

Introduction

The 9 April 1984 Application of Nicaragua confronts this Court with issues of very great significance. These issues go to the heart of the role of judicial settlement in the resolution of international disputes generally, and of the subject-matter competence of this Court in particular. These questions, which may be grouped together under the single rubric of "admissibility", encompass two largely distinct, yet closely related, sets of considerations. The first of these includes all those factors under the Charter of the United Nations that compel the conclusion that the claims and allegations put forth by Nicaragua lie outside the competence of this Court as an integral part of the United Nations system. The second concerns those factors which suggest strongly that this Court should, in the prudent exercise of its judicial discretion, decline to adjudicate the Nicaraguan claims and allegations. We believe that this result stems from the inherent limitations of the judicial process and the importance of safeguarding the integrity of that process. Professor Sohn will address the former considerations and Professor Moore will follow with a discussion of the latter.

In order that these issues of admissibility be understood in their proper context it is necessary at the outset to bear in mind certain matters of particular relevance. The first of these is that, while the United States firmly rejects the Nicaraguan Application, it is on the basis of that Application that this Court must address the question of admissibility. Nicaragua should not be permitted to escape the consequences that Nicaragua has set for itself in choosing to frame its own Application in the manner that it has.

Secondly, what Nicaragua is in fact asserting in its Application is the existence at this moment of an on-going armed conflict. Nicaragua asserts that, in this conflict, the United States is engaging in the unlawful use of armed force against the political independence and territorial integrity of Nicaragua. It is unnecessary to recite here the specific allegations that Nicaragua has made in its Application in support of this one, over-arching, claim. This claim emerges, however, with undeniable force, from virtually every single paragraph of Nicaragua's Application and from the oral argument made on Nicaragua's behalf before this Court. Having so claimed with such vehemence and repetition, Nicaragua cannot now be heard to assert that it is claiming something different.

Thirdly, and of great significance in so far as the admissibility of the Application is concerned, Nicaragua has chosen to characterize the alleged facts in its Application as evidencing the existence of "threats or breaches of the peace, and acts of aggression" (I, Application, para. 12). As we shall demonstrate, the consequences of such claims to the admissibility of the Nicaraguan Application are fatal and cannot be avoided by artful pleading.

Mr. President and distinguished Members of the Court, it is now my privilege and honour to invite the Court to call upon one of the world's leading authorities on the United Nations Charter and system, Professor Louis Sohn.

ARGUMENT OF PROFESSOR SOHN

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Professor **SOHN**: Mr. President, distinguished Members of the Court, may it please the Court.

Summary of Argument

It is a great honour for me to appear before this Court, especially as I started, as a young man, my international career by serving in the Permanent Court observer delegation to the San Francisco Conference, and as I have followed the work of the Court faithfully every since.

I should like to begin by briefly summarizing the main points of the United States argument on this subject.

The Nicaraguan Application asserts that there is taking place, at this moment, an unlawful use of armed force against the political independence and territorial integrity of Nicaragua. The Application asserts that the United States is engaging in such an on-going unlawful use of armed force, or otherwise bears legal responsibility for it. The Application furthermore concedes that Nicaragua has sought unsuccessfully to obtain from the Security Council a determination that these alleged acts of the United States constitute "threats or breaches of the peace, and acts of aggression" under Article 39 of the Charter of the United Nations (**I**, Application, para. 12).

The Application is therefore inadmissible because it presents matters that, under the system established by the Charter, fall within the competence of the Security Council to the exclusion of the subject-matter competence of this Court. This conclusion is compelled by the manifest intent and purpose of the Charter, and by the text of its provisions.

Nor can the Application be admissible because, as Nicaragua asserts, the Security Council declines to grant the determination sought by Nicaragua by virtue of the failure of the proposed determination to attain the majority required for adoption under Article 27 (3) of the Charter. The machinery established by the Charter for the maintenance of international peace and security in this respect has functioned exactly as it was intended to function by the drafters of the Charter, who were well aware of the nature of the decision-making process and the majority required. Neither the Charter nor the Statute of the Court has conferred on the Court the competence to reverse decisions of the Security Council or the power to engage in functions expressly allocated to the Security Council by the Charter.

Nor can the Court accept Nicaragua's efforts to draw an artificial distinction between the so-called "strictly juridical aspects" of the Nicaraguan claims and the determination of "any threat to the peace, breach of the peace, or act of aggression" under Article 39 of the Charter. Both the text and history of the Charter are clear that questions involving the on-going use of armed force fall within the exclusive competence of the political organs, primarily that of the Security Council but also in special circumstances that of the General Assembly acting under Chapter IV and that of regional arrangements or agencies consistent with Chapter VIII. This is true regardless of how questions are characterized.

Finally, the right to engage in individual or collective self-defence recognized by Article 51 of the Charter is absolute, may not be impaired by this Court or any other organization of the United Nations, and can be terminated only by the Security Council taking effective measures to maintain international peace and security.

In sum, Nicaragua is asking the Court to alter the balance of the Charter and to assume functions deliberately vested elsewhere by the Charter. For these reasons, the Nicaraguan Application must be held to be inadmissible.

Now, Mr. President, I plan to discuss each of these issues, one by one.

Argument

Article 36 (2) of the Statute of the Court provides in pertinent part that the compulsory jurisdiction of the Court shall extend to "all legal disputes". What constitutes a "legal dispute", and how one may distinguish between "legal" and other categories of disputes, has long been the subject of great controversy. It has been pointed out by Professor Pellet, and I have a long list of other articles and books that might be relevant on the subject, listed directly here. See for instance, Borchard, "The Place of Law and Courts in International Relations", 37 *Am. J. Int. L.*, pages 46-57 (1943); Bruns, "Politische und Rechtsstreitigkeiten", 3 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Part I, pages 445-487 (1932); Gihl, "'The Subjective Test' as a Means of Distinguishing between Legal and Political Disputes", 8 *Acta Scandinavica Juris Gentium*, pages 67-107 (1937); Hostie, "Différends justiciables et non-justiciables", 9 *Revue de droit international et de législation comparée*, pages 263-281, 568-587 (3rd ser., 1928); Kelsen, *Law and Peace in International Relations*, pages 159-168 (1942); Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law", 8 *Economica*, pages 277-317 (1928); Morgenthau, *La notion du "politique" et la théorie de différends internationaux* (1933); Sir John Fischer Williams, "Justiciable and Other Disputes", 29 *Am. J. Int. L.*, pages 31-36 (1932); Rosenne, "Equitable Principles and the Compulsory Jurisdiction of International Tribunals", *Festschrift für Rudolf Bindschedler*, pages 407-411 (1980). Despite this lengthy and learned debate, there exists no general agreement on a test, or tests, to identify cases which properly belong before the Court. Contrary to the impression sought to be left by counsel for Nicaragua, the United States does not believe that the Court need join this decades old debate. It is not the United States' purpose to argue that the Application must be dismissed because it presents a "political" question, as opposed to a "legal" question. Rather, it is our purpose to demonstrate that the allegation upon which the Nicaraguan Application depends in its entirety, namely, that of an on-going use of unlawful armed force, was never intended by the drafters of the Charter of the United Nations to be encompassed by Article 36 (2) of the Statute of the Court. In a word, the Nicaraguan claims are on the face of the Charter excluded from the subject-matter competence of the Court.

The United States would stress at the outset that the notion that questions involving on-going armed conflict lie outside the competence of international judicial settlement is by no means a novel one. Indeed, one may discern a consistent theme underlying the history of compulsory third-party settlement of international disputes from its beginning just prior to the turn of this century. Thus, States entering into compulsory arbitration conventions in the wake of the Hague Conferences of 1899 and 1907 habitually excluded from their undertakings to arbitrate matters involving such things as "vital interests", "independence", or "national honour". For example, Article I of the Anglo-French Convention of 14 October 1903 provided as follows:

> "Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties."

Similar provisions are found in numerous other conventions of the period, including, for example, the Convention of 23 January 1909 between the United States and Brazil and the Inter-American General Treaty on Compulsory Arbitration of 29 January 1902, and even much later, as in the Treaty of 17 December 1939 between Colombia and Venezuela, which excepted disputes affecting "the vital interests, independence or territorial integrity" of the parties.

The same theme emerges, albeit in a somewhat different form, in the era of the League of Nations and the Permanent Court of International Justice. The history of the second paragraph of Article 36 of the Statute of the Permanent Court — the predecessor of Article 36 (2) of the Statute of this Court — is well known and need not be repeated here. Suffice it to say that the abiding concern was that States not be faced with the prospect of being brought before the Permanent Court, without their express consent, over matters which, while perhaps coloured in "legal" terms, directly implicated their security interests. It was precisely for such reasons that numerous States — among them Australia, Canada, Czechoslovakia, France, India, Iran, Iraq, Italy, New Zealand, Peru, Romania, South Africa and the United Kingdom — took pains to expressly exclude from their declarations accepting the compulsory jurisdiction of the Permanent Court, matters under consideration in the Council of the League. As explained by the United Kingdom at the time of making its declaration in 1929, such a reservation was intended "to cover disputes which are really political in character though juridical in appearance" (Parliamentary Papers, Misc. No. 12 (1929), Cmd. 3452, p. 6).

For the same reason, with the breakdown of the League system and the outbreak of World War II, numerous States moved immediately to modify their declarations so as to exclude expressly disputes arising out of events occurring during the war. Rather than constituting, by implication, an admission that the competence of the Permanent Court in fact extended to such matters, these modifications were intended, *ex abundanti cautela*, to ensure that the breakdown of the political organs of the League would not lead to attempts to bring before the Permanent Court disputes never intended to be dealt with in that forum. As stated with force and clarity by Canada in its communication of 7 December 1939 to the Secretary-General of the League:

> "The general acceptance of the Optional Clause providing for the compulsory adjudication of certain issues was part of the system of collective action for the preservation of peace established under the covenant of the League. It is clear that the conditions assumed when the Optional Clause was accepted do not now exist, and that it would not be possible that the only part of the procedure to remain in force should be the provisions restricting the operations of the countries resisting aggression." (League of Nations, *Official Journal* (January-February-March 1940), p. 44, at p. 45.)

It is the same consideration that may be said to underlie comparable provisions in several existing declarations accepting the compulsory jurisdiction of the present Court, such as those of El Salvador, India, Malawi and the Sudan.

Indeed, Professor Chayes has dealt with this issue in his interesting article "A Common Lawyer Looks at International Law", published in the *Harvard Law Review* in 1965 (Vol. 78, p. 1396). In discussing the role of courts in the international field, he points out that where grave interests of governments are involved, it would not be "responsible lawyer's advice" to ask a State to submit the matter to the judgment of a court (p. 1398). Later in the same article, he suggested that "most great disputes between States, even when they involve important legal elements, are not justiciable" (p. 1409), and re-emphasized that point by stating that "most important disputes of policy between States are not justiciable" (p. 1410).

The United States would observe, parenthetically, that the conditions that prevailed in 1939 because of the breakdown of the League machinery for the maintenance of international peace do not exist under the present system established by the Charter of the United Nations. Indeed, as the United States shall shortly demonstrate, the present machinery is not only available to take appropriate action in cases such as those alleged to exist by Nicaragua, but has in fact acted with respect to the claims that Nicaragua would have this Court adjudicate.

The breakdown of the security system established by the Covenant of the League of Nations was followed by the descent into general war. The States that were engaged in collective resistance to aggression in that conflict were virtually united in their determination that a new, more effective international mechanism would be required for the maintenance of international peace and security in the post-war world. The consequence was the establishment of a new general international organization under the Charter of the United Nations, of which this Court is made an integral part by virtue of Article 92 of the Charter.

The history of the evolution of the Charter system is set down in considerable detail in Chapter II of Part IV of the United States Counter-Memorial of 17 August, and there is no need to recount those details here. It would be well, however, to touch upon certain fundamentals of that system and how they bear upon the competence of the Court to entertain Nicaragua's claim that the United States is, at this very time, engaged in the unlawful use of armed force against its political independence and territorial integrity.

It must, first of all, be recalled that the United Nations was planned with the maintenance of international peace and security as its primary and most fundamental goal. As this Court pointed out in its Advisory Opinion in the *Certain Expenses* case:

> "[T]he primary role ascribed to international peace and security [in Article 1 of the Charter] is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition" (*I.C.J. Reports 1962*, p. 151, at p. 168).

Given this history and the pervasive emphasis at Dumbarton Oaks and San Francisco on the establishment of a general international organization having the maintenance of peace and security as its primary purpose, the absence of any reference to a role for the contemplated Court in circumstances such as those alleged in the Nicaraguan Application is striking. The inescapable impression is that the framers of the Dumbarton Oaks proposals and of the Charter did not conceive of such matters as being within the purview of judicial modes of settlement.

The United States would like to refer in this connection to one discussion at the San Francisco Conference that considered the relation between the Security Council and the Court in a case involving a threat to the peace. When the delegate of Turkey proposed that the Security Council should not interfere in a case being heard by the International Court of Justice, except if "the dispute developed into a threat to the peace", the delegate of the United States explained to the satisfaction of the Turkish delegate that "if a dispute were being satisfactorily handled by the Court and there was no threat to the peace, then there should be no interference by the Council" (12 *UNCIO*, docs. 73-74; see also United States Counter-Memorial, para. 476).

The corollary of this statement is clearly that when a threat to the peace is alleged, as has been done by Nicaragua, the Security Council, and not the Court, would be the competent organ for dealing with it. *A fortiori*, if an alleged threat to the peace has been discussed by the Council prior to the submission of the case to the Court, the matter should not be presented to the Court until the Council has ascertained that there is no longer a threat to the peace. Professor Kelsen, in discussing this incident in San Francisco, would have gone even further. He suggested that Article 36 (3) of the Charter might be interpreted as making it possible for the Council not only to recommend that a legal dispute be referred to the Court but also that a non-legal dispute such as one involving a threat to the peace already referred to the Court be brought instead to the Security Council (*Law of the United Nations*, p. 406 (1950)).

It is not necessary to embrace the whole of Professor Kelsen's views to acknowledge the validity of his underlying premise. It is the gravity of the danger to world peace that a dispute presents, or is alleged to present, that determines whether the Court or the Security Council should be considering it, regardless of what "juridical aspects" it may otherwise be alleged to possess. In this case, the Nicaraguan Application on its face presents precisely that sort of circumstance that the Charter confides to the Security Council.

Leaving aside the drafting history of the Charter, the answer to the question who has exclusive jurisdiction to deal with any threat to the peace, breach of the peace or act of aggression can be found in the specific language of the Charter of the United Nations.

Article 24 (1) of the Charter confers upon the Security Council "primary responsibility for the maintenance of international peace and security". The Security Council's role is "primary" but not exclusive, as the Charter elsewhere expressly confers on the General Assembly certain complementary responsibilities with respect to the maintenance of international peace and security, as this Court recognized in the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 151, at p. 163). Similarly, the Charter recognizes that regional settlement mechanisms such as the Contadora group have a role to play with respect to such matters. Apart from these two exceptions, nothing in the text of the Charter or in the records of the San Francisco Conference suggests that use of the word "primary" was intended to empower other organs, in particular this Court, to exercise the responsibilities expressly conferred by the Charter on the Security Council, the General Assembly, and regional arrangements.

The powers of the Security Council with respect to the maintenace of peace and security are divided into two distinct categories: pacific settlement of disputes in accordance with Chapter VI of the Charter, and action with respect to threats to the peace, breaches of the peace and acts of aggression in accordance with Chapter VII. Chapter VIII contains some additional provisions relating to the relative role of the Security Council and of the regional arrangements with respect to matters appropriate for regional action.

Nicaragua invokes in its own oral argument certain comments on the San Francisco deliberations as justifying the conclusion that the powers of the Security Council and the General Assembly are not affected by Article 52 of the Charter (p. 120, *supra*). Of course, as noted in the Nicaraguan oral argument (p. 121, *supra*), paragraph 4 of Article 52 provides explicitly that this Article "in no way impairs the application of Articles 34 and 35". Any careful review of the San Francisco records will show, however, that this last provision was designed primarily, and perhaps exclusively, to safeguard the power of the Security Council to step in whenever it "deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security" (Art. 37, para. 2). *A fortiori*, the Security Council may, independently of any regional proceedings, take under Article 39 of the Charter any measures it deems necessary to maintain or restore international peace and security in any situation where "existence of any threat to the peace, breach of the peace or act of aggression" is alleged. This rule applies with equal force to any proceeding before the Court: once a situation reaches the point of danger which provides the dividing line between Chapters VI and VII of the Charter, it is the Security Council that has the power and the responsibility to deal effectively with that situation. Once one distinguishes properly between disputes under Chapter VI and Article 52, on the one hand, and threats to the peace under Chapter VII and Article 53, there is no contradiction in the United States position, contrary to Nicaragua's allegations (p. 123, *supra*).

The difference between the Security Council's jurisdiction under Chapters VI and VII is emphasized by several factors. First, under Chapter VI the Security Council can make only recommendations to the parties (except for certain preliminary decisions under Article 34) while under Chapter VII the Security Council can make binding decisions. Second, in decisions under Chapter VI, a party to a dispute is obliged to abstain from voting (Art. 27 (3) of the Charter), while under Chapter VII there is no such restriction. Third, the General Assembly has broad powers to deal with international disputes brought before it under Chapter VI, especially Article 35 of the Charter, subject only to the limitations contained in Articles 11 and 12 of the Charter which are designed to avoid a conflict between decisions of the Assembly and the Security Council. There is, however, no mention of the General Assembly in Chapter VII. The Charter confers only a limited power on the Assembly to make recommendations in situations relating to the maintenance of international peace and security, as pointed out by this Court in the *Certain Expenses* case (*I.C.J. Reports 1962*, pp. 163-165) and as noted in the Counter-Memorial (**II**) of the United States (para. 457). Fourth, while decisions under Chapter VI must be in conformity with the principles of justice and international law, as I shall discuss later, there is no such limitation on the action to be taken under Chapter VII of the Charter in view of the need "to take effective collective measures for the prevention and removal of threats to the peace and for suppression of acts of aggression". Fifth, both judicial settlement and the Court are mentioned in Chapter VI, but there is no reference to the Court in Chapter VII, nor any reference — comparable to those relating to the General Assembly — elsewhere in the Charter indicating that the Court should deal in any way, however limited, with alleged threats to the peace, breaches of the peace or acts of aggression.

The Court rose at 12.57 p.m.

THIRTEENTH PUBLIC SITTING (16 X 84, 3 p.m.)

Present: [See sitting of 8 X 84.]

Mr. SOHN: Mr. President, distinguished Members of the Court, this morning I was trying to explain the grand design of the Charter and how the provisions on maintenance of peace and security were developed, and how the division of powers was envisaged by the framers of the Charter. Just before the break, I was explaining also in particular, the division between the powers of the Security Council and other organs of the United Nations under Chapter VI dealing with settlement of disputes and Chapter VII dealing with questions of maintenance of peace and security in case of breaches of the peace or acts of aggression.

If the parties to a dispute specifically *agree* to go to the Court, Article 33 of the Charter welcomes it, and the Security Council may encourage it under paragraph 2 of that Article. Once a dispute is actually before the Council, the Council may, under Article 36 (1), "recommend appropriate procedures or methods of adjustment".

It is in this connection, and only in this connection, that the Charter makes any specific reference to this Court in its provisions dealing with questions of peace and security. Thus, Article 36 (3) provides that:

> "In making recommendations *under this Article* the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." (Emphasis added.)

Article 36 (3) is of fundamental significance in at least two respects. First, it provides textual support for the potential competence of the Court in matters relating to peace and security, but only where agreed to by the parties *and* only with respect to disputes or situations that have not yet given rise to a danger to the maintenance of international peace and security. Nicaragua could not, consistent with its Application, be considered to be alleging the existence of only this sort of "dispute" or "situation". Secondly, Article 36 (3) implies a prior determination by the Security Council that the issues involved in the dispute or situation confronting it are primarily "legal" *and* that a recommendation that the parties thereto refer the matter to the Court would be appropriate and effective in the circumstances of the case. Wilfred Jenks has noted in his magisterial volume on the *Prospects of International Adjudication* (1964, pp. 32-33), that the Security Council in its first 20 years refused to refer to the Court under Article 36 (3) of the Charter or for an advisory opinion at least in 11 cases, such refusal being based in several cases on the ground that they had "an important political aspect." Among the cases he lists were situations involving armed hostilities in Indonesia, Palestine, Hyderabad and Kashmir, as well as the Berlin blockade.

Chapter VII of the Charter concerns matters which have gone beyond the mere potential for endangering the maintenance of international peace and security, and deals with them in a manner fundamentally different from Chapter VI. The well-known Article 39 of the Charter provides that:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommen-

> dations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The Authority of the Security Council in this regard is, in a word, the heart of the security system devised by the framers of the Charter. As distinct from lesser circumstances dealt with in Chapter VI of the Charter, Article 39 makes no reference to the General Assembly or any other organ of the United Nations, and no such reference can be found elsewhere in Chapter VII.

The central importance of the Security Council's role with respect to the determination of the existence of a threat to or breach of the peace, or act of aggression, was clearly understood at the San Francisco Conference. Much energy was devoted at San Francisco to deciding whether to vest such power only in the Security Council, or whether such a power should be shared, to a greater or lesser degree, by the General Assembly.

The decision taken by the Conference was a decisive one. As stated in the Report of Committee 3 of Commission III relating to the Security Council, the majority of States that took a position on the question were of the view that:

> "The application of enforcement measures, in order to be effective, must above all be swift; they recognized in general that it is impossible to conceive of swift and effective action if the decision of the Council must be submitted to ratification by the Assembly, or if the measures applied by the Council are susceptible of revision by the Assembly. This, moreover, would be contrary to the basic idea of the organization, which contemplated a differentiation between the functions of the Council and those of the Assembly." (11 *UNCIO*, p. 12, at pp. 14-15.)

The Committee also decided "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression" (*ibid.*, at 17).

In thus concentrating on the relationship between the Security Council and the General Assembly, the framers of the Charter were reaffirming their common understanding that questions involving the on-going use of armed force could only be resolved by political, as opposed to judicial, mechanisms. This understanding is reflected also in Article 1 (1) of the Charter, the most significant of the United Nations "purposes" that, under Article 24 (2), govern the scope of the Security Council's competence. As explained in detail in Section II (B) of Part IV of the United States Counter-Memorial, the language of Article 1 (1) in so far as it concerns "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace", was consciously and deliberately drafted so as to ensure that the discretion of the Security Council to decide upon appropriate action in a given case involving on-going hostilities would remain unfettered.

Nicaragua would have this Court overlook this clear and compelling pattern, and does so in part by relying on Article 12 (1) of the Charter, which bars the General Assembly from making "any recommendation" with regard to a "dispute or situation" being considered by the Security Council, unless the Security Council so requests.

Since the preclusion of Article 12, paragraph 1, extends only to the General Assembly, it is argued that it is clear that no other organ, in particular the Court, is similarly barred. The United States answer is a simple one. To begin with, Article 12, paragraph 1, must be read in the context of Article 11, paragraph 2, of the Charter, which vests in the General Assembly express authority to make "recommendations" to the Security Council. Moreover, the role of the General

Assembly in that regard is specifically confined to Chapter VI "disputes" or "situations", as Article 35 (3) of the Charter makes clear.

On a deeper level, however, the express reference to the General Assembly in Article 12, paragraph 1, reflects the fact that the framers of the Charter intended that, among the organs of the United Nations, only the General Assembly would have a role supplementary to that of the Security Council in the maintenance of international security. It was simply never considered at the San Francisco Conference that the Court would, or should, have the competence to engage itself in such matters. Indeed, a role for the Court in this respect was suggested only once, and was emphatically rejected. It will be recalled that Belgium proposed an amendment to what became Chapter VI, to the effect that a State party to a dispute before the Security Council could request an advisory opinion from the Court as to whether "a recommendation or a decision made by the Council or proposed in it" would infringe that State's "essential rights", that is, rights "granted by positive international law as an essential right of statehood" — clearly a legal question in the sense advocated by Nicaragua. If the Court agreed, according to that proposal, then the Council would have had to reconsider the matter or refer it to the General Assembly for decision. In addition to objections based on the fear that this amendment would weaken the position of the Security Council, the Belgian amendment was strongly opposed on the interesting ground it would necessarily involve the Court in deciding "political questions in addition to legal questions" (Summary Report of the Ninth Meeting of Committee III/2, 12 *UNCIO*, p. 66). As a consequence, the Belgian proposal was withdrawn.

Nicaragua would have the Court disregard the clear history and express language of Chapter VII of the Charter and the practice of the United Nations and proceed to adjudicate the merits of Nicaragua's claims, which, as the Application concedes, are identical to those upon which it unsuccessfully sought a determination from the Security Council under Article 39 of the Charter. We submit that the Court cannot accede to Nicaragua's request without directly and unavoidably infringing the competence expressly vested in the Security Council by that Article.

Counsel for Nicaragua has asserted an astonishingly narrow conception of the role of the Security Council. As the United States understands his argument, the Security Council only acts under Chapter VII of the Charter when it decrees enforcement measures in the form of military action or economic sanctions. What is more, the Council must specifically cite Article 39 of the Charter, or employ its express words of determination. But this allegation overlooks the practice of the Council itself, which has rarely found it necessary to employ the specific language of Chapter VII, in particular Article 39, in adopting binding resolutions directed at on-going uses of armed force such as that alleged in the Nicaraguan Application.

Counsel's assertions in this regard are doubly curious in that they flatly contradict Nicaragua's own characterization of its claims before the Security Council. The Nicaraguan draft Security Council resolution of 4 April 1984 may be found at Exhibit D of Annex III of the Nicaraguan Memorial. Nowhere in that draft can one find a reference to Article 39. Nowhere can one find the language of that Article, nor a request for enforcement measures as conceived of by counsel for Nicaragua. Yet Nicaragua has said in paragraph 12 of its Application that its claims related to "threats or breaches of the peace, and acts of aggression". Nicaragua either made such claims, or it did not. Nicaragua cannot now, in its oral argument, rewrite its Application to deny that it sought to invoke the competence of the Security Council under Chapter VII of the Charter.

These profound difficulties cannot be avoided by the argument that the Security

Council, having failed to grant the determination requested by Nicaragua by virtue of the negative vote of the United States, has failed to act with respect to the on-going armed conflict in Central America, and thereby has removed an impediment to the Court's competence.

To this two responses may be made. The first is that the Security Council has in fact acted with respect to the on-going conflict in Central America. Simply put, the Security Council has acted by endorsing, in its resolution 530 (1983), the Contadora process as the appropriate mechanism for seeking the resolution of the security and other, interrelated, problems of the region. Nicaragua, having sought a different resolution and having failed to secure it, cannot now be heard to claim that the Security Council has failed to exercise its responsibilities with respect to the maintenance of international peace and security under the Charter.

The second response that the United States would offer concerns the claim that the refusal of the Security Council to determine the existence of a threat to or breach of the peace, or an act of aggression, vests the Court with the competence to reach a substantially identical determination, where the "refusal" of the Council results from the failure of the proposed determination to achieve the majority required for adoption under Article 27, paragraph 3, of the Charter. To this the United States would answer that the requirement for the affirmative vote of all permanent Members of the Security Council laid down in Article 27, paragraph 3, was no accident. The drafters of the Charter, in delegating to the Security Council, and, I might add, to regional arrangements within the limits of Chapter VIII, the responsibility for dealing with circumstances of the nature of those alleged by Nicaragua, did so with the clear and deliberate awareness of the procedures that they chose to prescribe for action by the Security Council, and in particular the majority required for such action. Indeed, the Nicaraguan delegation at San Francisco voted against efforts to modify the voting formula laid down in what is now Article 27, paragraph 3, of the Charter (11 *UNCIO, Documents*, pp. 518-519).

The unwillingness of the Security Council to take the action desired of it by a State may well be a source of deep dissatisfaction to that State, and understandably so. The United States itself has experienced the same dissatisfaction on many occasions. But the fact that the Council may function in the manner in which it was expressly intended to function cannot be grounds for locating, in this Court, a subject-matter competence that is alternative to, yet identical with, that specifically conferred on the Security Council by the Charter.

Nor can the so-called "necessity" principle operate in this case. As the United States has previously noted, Nicaragua's real complaint is not that the Security Council has failed to act. It has acted in recognizing the Contadora process as the appropriate mechanism for resolution of Central American concerns, including but not limited to security concerns.

Nicaragua's real complaint is that the Council has failed to act in the manner *wished by Nicaragua*. Moreover, the Council, in rejecting Nicaragua's demand for a determination under Article 39, did so in the manner precisely conforming to the requirements of the Charter. Thus, there is no room in which the "necessity" principle can in any way be brought into play.

The United States would quote in this connection the statement of the President of the Court, Judge Winiarski, in his dissenting opinion in the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 151, at p. 230):

> "The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

> The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being."

Nicaragua is asking this Court to sacrifice the balance so carefully established in the Charter in the most important field of United Nations activities, the maintenance of international peace and security. Without that balance, there would have been no Charter; without that balance, the Charter would be a completely different document from the one so carefully drafted at San Francisco. The framers of the Charter deliberately vested in the Security Council, under Article 39 of the Charter, the responsibility for making the determination requested of this Court by Nicaragua. The framers of the Charter chose to make such determinations dependent upon *inter alia*, the concurring votes of the permanent members of the Security Council. The framers of the Charter could have vested concurrent competence in this Court; they did not. The framers of the Charter could have decided upon some other voting formula in the Council; they did not. The framers could have empowered States to appeal to this Court from the Security Council; as shown by the abortive Belgian experience, they did not.

The Charter of the United Nations is a finely tuned instrument designed to function in a manner that takes into account the realities of maintaining international peace and security in the post-war world. It has, admittedly, not been as successful in this regard as the United States and others had hoped. But if the system established by the Charter is to be altered, it may be done only with the consent of all the parties and in accordance with the mechanisms established for the purpose in Chapter XVIII. Nicaragua is, however, asking that the Court take this task upon itself by stepping into the shoes of the Security Council in order to render a determination that the Security Council, in the exercise of its functions under Article 39 of the Charter, was not prepared to make.

Nor can it be maintained that the questions put before the Security Council and before this Court by Nicaragua are somehow different, and that it is possible to adjudicate the "strictly juridical aspects" of the matter without infringing the competence of the Security Council to determine the existence of a threat to or breach of the peace, or act of aggression under Chapter VII of the Charter. It must once again be recalled that what Nicaragua is seeking is the adjudication of what Nicaragua itself claims to be an on-going, unlawful use of armed force in violation, in particular, of Article 2 (4) of the Charter, and of such a magnitude as to constitute a "threat to the peace, breach of the peace or act of aggression" under Article 39.

But whether or not the determination of such claims involves a "juridical" act, under the circumstances alleged in the Application, it is one that has been confided to the competence of the Security Council under the express words of Article 39 of the Charter. This is made absolutely clear in the Definition of Aggression adopted by the General Assembly in 1974 as the culmination of a long and difficult process that had its origins at the San Francisco Conference. The purpose of the drafters of the Definition of Aggression, as noted in paragraph 4 of resolution 3314 (XXIX) by which the General Assembly adopted the Definition, was to furnish guidance to the Security Council in determining, under Article 39 of the Charter, the existence of an act of aggression, in circumstances precisely like those Nicaragua in its Application alleges to exist. That purpose utterly dominates the extraordinary history of the long effort to achieve such a definition, recounted in detail at Section II (C) (3) of the United States Counter-Memorial. It pervades the text of the Definition ultimately arrived at in 1974. That Definition, among other things, makes clear that it is the Security Council that has the responsibility and the authority to determine whether an on-going use of armed force is "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". As noted in paragraph 490 of the United States Counter-Memorial (II), the Definition, in preambular paragraphs 2 and 4 and in Articles 2 and 4, emphasizes that the Definition had been drafted for the benefit of the Security Council and is not intended in any way to detract from the Council's powers under the Charter.

We submit that it is simply not possible for this Court to adjudicate Nicaragua's fundamental claim — that of an on-going, unlawful use of armed force — without embarking on the performance of a function that Article 39 of the Charter, as elaborated in the Definition of Aggression, reserves to the Security Council. In this respect it makes no difference whether, semantically, the claims asserted before the Court employ the specific language of Article 39 or some other formulation based, for example, on the language of Article 2 (4) of the Charter. The juridical result is the same.

The foregoing point is sufficiently crucial to warrant restating: as the Definition of Aggression makes clear, there is no distinction between the determination, in the midst of an on-going armed conflict, of the lawfulness of the use of armed force of the nature and magnitude that Nicaragua itself alleges, and the determination of "the existence of any threat to the peace, breach of the peace or act of aggression" by the Security Council under Article 39 of the Charter.

More than mere abstractions are involved here. The Definition of Aggression expressly acknowledges the discretion, as well as the responsibility, of the Security Council with respect to Article 39 determinations. The significance of this cannot be overstated. In this respect those who drafted the 1974 Definition of Aggression solved one of the fundamental dilemmas that complicated every previous effort to achieve an acceptable definition of "aggression", namely how to define a concept that was to be applied to circumstances of on-going armed conflict without impeding the vital role of the Security Council under Article 39 of the Charter. That dilemma was succinctly summarized in the report of Committee 3 of Commission III (Security Council) at the San Francisco Conference which I cited previously:

> "A preliminary definition of aggression went beyond the possibilities of this Conference and the purposes of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in other cases listed, automatic action by the Council might bring about a premature application of enforcement measures.
>
> The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision, and also

> the entire responsibility for that decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression." (11 *UNCIO*, p. 17.)

A determination of sweeping claims, such as those urged on the Court by the Nicaraguan Application, in the form of a judgment at law presupposes the abandonment of precisely that flexibility and discretion that the architects of the Charter, and the drafters of the Definition of Aggression, considered so imperative to preserve. It would erect just that sort of "signpost" that the Charter, and the Definition of Aggression, were painstakingly designed to avoid. In addition, the potential in any given case for a direct challenge to the prerogatives of the Security Council would be great. It would hardly be in the institutional interest of either the Court or the Council, nor healthy for the Charter system as a whole, if a State, having failed to persuade the Security Council to reach an Article 39 determination, were to obtain a functionally identical determination from this Court and then return to the Council to seek its enforcement under Article 94 (2) of the Charter.

The concept advanced by counsel for Nicaragua that the Court somehow functions as a parallel settlement mechanism to that of the Security Council in cases of on-going armed conflict as alleged in Nicaragua's Application is not acceptable for yet another reason, and one that is made clear by the *Aerial Incident* cases relied on by Nicaragua. It will be recalled that in each of those cases, the Court was unable to resolve the matter for the simple reason that the respondent State had failed to accept the compulsory jurisdiction of the Court, or was able to invoke reciprocity to defeat the Court's jurisdiction. It is hard to imagine that the architects of the Charter and the Statute of the Court, preoccupied as they were with the maintenance of peace and security, would have vested the Court with a competence comparable to that of the Security Council, but only in respect of those relatively few States that would accept the compulsory jurisdiction of the Court. That notion runs counter to the basic idea of the Charter, namely that the mechanisms for dealing with matters involving the on-going use of armed force were to apply to the membership as a whole, not just those States that chose to subject themselves to those mechanisms.

Nor, we submit, does it relieve the Court of the extraordinary burden that Nicaragua would thrust upon it to argue that there could be cases in which the adjudication of issues relating to on-going armed conflict including, perhaps, even issues relating to the lawfulness of the use of armed force, would be appropriate and compatible with the Charter scheme. We do not, of course, deny that possibility. Indeed, counsel for Nicaragua has advanced the *Corfu Channel* case and the several mid-1950s *Aerial Incident* cases mentioned above as examples of instances in which the claimed unlawful use of armed force was a matter appropriate for judicial decision. What counsel for Nicaragua failed to point out, however, was that in each such case the complained-of action had already taken place. In each case, the Court was called upon to adjudicate the rights and duties of the parties with respect to a matter that was fully in the past, that was not on-going, that was not merely one element of a continuing stream of actions. As the United States points out at paragraphs 481 to 484 of its Counter-Memorial (II), it was precisely the fact that the Corfu Channel incident was not part of an on-going use of armed force that led the Security Council to conclude that its competence was not engaged, and that the matter could therefore appropriately be resolved by judicial means. Exactly the same may be said in respect of the *Aerial Incident* cases.

On the other hand, we are faced here with a specific case, in which the Applicant alleges, in great detail and at considerable length, the use, supposedly taking place right now, of enormous military force against its "sovereignty, territorial integrity and political independence". The facts alleged by Nicaragua cannot be construed otherwise than as falling squarely within the scope of the Definition of Aggression and Article 39 of the Charter and, indeed, Nicaragua freely concedes this in the Application. We do not understand Nicaragua to be arguing for anything less, or that anything less would be acceptable to it.

In its oral argument (p. 105, *supra*) Nicaragua has cited the Order of this Court in the case of the hostages in the American Embassy in Tehran, where the Court pointed out that "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*I.C.J. Reports 1979*, p. 15, para. 24). But in the present case the situation is completely different. Nicaragua is not asking the Court to decide one aspect of the relations between the United States and Nicaragua; it wants the Court to consider the whole of the United States relations with Nicaragua and its Application raises a host of issues alleging a variety of violations of the Charter of the United Nations, of the Charter of the Organization of American States and of various rules of international law. Obviously, this case is of a quite different nature from the one contemplated in the Order of 15 December 1979.

In its oral argument, Nicaragua has relied also on the statement of the Permanent Court of International Justice in the case of the *Rights of Minorities in Upper Silesia (Minority Schools)* that

> "the Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it" (*P.C.I.J., Series A, No. 15*, p. 22).

It must be noted, however, that the *Minority Schools* case was submitted to the Court under the Compromissory Clause in the Upper Silesia Convention and not under the Optional Clause of the Court's Statute. The importance of this difference became very clear when the United Nations Committee of Jurists, meeting in Washington just before the San Francisco Conference, was discussing a British proposal to bring paragraph 1 of Article 36 of the Court's Statute into line with paragraph 2 by changing "all cases" to "all cases of a justiciable character" (14 *UNCIO*, pp. 204, 318). Professor Basdevant (France) opposed this proposal on the ground that paragraph 1

> "aims at the cases which the Parties have agreed to refer to the Court, and, therefore, they must feel that the Court can decide the case under Article 38. In his opinion that is sufficient to make a dispute justiciable." (*Ibid.*, p. 205.)

He added later that paragraphs 1 and 2 were quite different, and that in cases of compulsory jurisdiction under paragraph 2 "the proposal that cases be specified as 'legal' is important" (*ibid.*, pp. 226-227); on the other hand, he noted that in the *Brazilian Loans* case, where in addition to legal questions a question of political character was involved, there seemed no reason to limit the Court's jurisdiction, since "the Parties had agreed to submit this case to the Court" (*ibid.*, p. 227). The United Kingdom amendment was rejected twice by the Committee, mostly on the ground that the requirement that jurisdiction be restricted to "justiciable" matters or those "of a legal nature" should not apply to cases "in which the jurisdiction of the Court depends on the agreement of the parties" (*ibid.*, p. 841). (For the full discussion of this issue by the Committee, see *ibid.*, pp. 204-205, 224-229, 288, 318, 841.) Consequently, the scope of the jurisdiction of the Court under paragraphs 1 and 2 of Article 36 is quite different in this respect, and one cannot rely on analogies from decisions under paragraph 1 when dealing with compulsory jurisdiction under paragraph 2.

In evaluating the admissibility of the Nicaraguan Application account must also be taken of the consequences of any adjudication of the lawfulness of specified use of armed force where that adjudication takes place in the midst of an on-going armed conflict involving various uses of force by several States. It is worth recalling the relevant language of Article 51 of the Charter:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

As recognized by Article 51, the right of a State to defend itself, and to provide and receive assistance in that respect from other States, is "inherent". That right neither derives from the Charter nor is constrained by it, with the single exception that the exercise of that inherent right must give way in the event "measures necessary to maintain international peace and security" are taken by the Security Council. Once again, the primacy of the Security Council in circumstances of on-going armed conflict such as that alleged to exist by Nicaragua is underscored, in a particularly dramatic fashion, by the express language of the Charter.

Article 92 of the Charter makes the Court an organ of the United Nations and incorporates its Statute into the Charter. The Court is thus bound by the categorical prescription in Article 51 that "[n]othing in the present Charter shall impair" the inherent rights guaranteed by that Article to all States. A judgment of the Court which sought to limit a State's recourse to its Article 51 rights in the manner demanded by Nicaragua — for example, by denying that State the right to furnish "support of any kind" to third States engaged in the exercise of their Article 51 rights — would *a fortiori* constitute such an impairment. Indeed, the process of adjudication itself, which would require a State claiming its Article 51 rights to pause to defend those rights in the very course of their exercise and to disclose information of value to the State against which those rights are claimed, would necessarily also constitute such an impairment.

In keeping with the system established for the maintenance of international peace and security by the Charter generally, and Chapter VII in particular, Article 51 recognizes the special role of the Security Council with respect to the exercise of the inherent rights preserved by that Article. It is the Security Council, and the Security Council alone, whose actions can limit the exercise of the right of individual or collective self-defence. The function of the Council in this regard must be understood in the context of the responsibility of the Council under Article 39 with regard to whether a State involved in an on-going armed conflict is chargeable with "any threat to the peace, breach of the peace or act of aggression", or any other use of armed force against the territorial integrity, sovereignty, or political independence of another State, or in any other manner inconsistent with the Charter. The limitation on judicial action inherent in Article 39 must extend as well to Article 51.

Finally, I mentioned previously the special position of regional arrangements or agencies under Chapter VIII of the Charter. It should be noted that such regional entities are, in addition to the Security Council and, to a limited extent, the General Assembly, the only entities expressly vested by the text of the Charter with a role in the maintenance of international peace and security. Article 52 provides that nothing in the Charter precludes such arrangements or agencies from dealing with such international peace and security matters "as are appropriate for regional action" and otherwise consistent with the purposes and principles of the United Nations. It further requires that member States entering into such arrangements or agencies "shall make every effort" to resolve local disputes through such means before referring them to the Security Council, and obliges the Security Council to encourage such efforts.

As Professor Moore shall shortly illustrate, the Contadora process, to which Nicaragua has agreed and which the United States strongly supports, is precisely the sort of "regional arrangement or agency" contemplated by Chapter VIII of the Charter, and has been endorsed as such by the Security Council. To the extent that Chapter VIII obliges States party to such regional arrangements to exhaust the possibilities for settlement provided by those arrangements prior to referring the matter to the Security Council, that obligation must apply *a fortiori* with even greater force in respect of resort to adjudication in the Court.

Conclusion of Argument

Mr. President, may I now briefly summarize my argument.

One may discern, with absolute clarity, that both the text and drafting history of the Charter of the United Nations exclude the possibility of adjudication as a means of adjusting a situation such as the one which is alleged in the Nicaraguan Application as existing in Central America, that is, circumstances involving an on-going use of armed force alleged to be in violation of the Charter. It was the deliberate decision of the architects of the Charter system that such matters were to be dealt with by the political organs created by the Charter for the express purposes of dealing with such matters, or otherwise recognized by the Charter as being entitled to exercise that responsibility. These are, primarily, the Security Council and, subsidiarily, the General Assembly and regional arrangements or agencies under Chapter VIII.

Adjudication by this Court of such questions is neither recognized in the text of the Charter nor compatible with its arrangements in respect of the maintenance of international peace and security. The Charter in this manner reflects the deeply-felt preference of States that disputes affecting their most important interests — among which the inherent right of individual and collective self-defence must be numbered — must not be subjected to compulsory third-party adjudication, but must be resolved by other, extra-judicial means. That preference long predates the Charter, and clearly influenced its architects and their conception of the appropriate role of judicial settlement in the resolution of international disputes.

Nicaragua is asking in its Application for nothing less than a repudiation of that tradition and for what would be, in effect, a judicial revision of the express terms of the Charter. It is asking that, in adjudicating what it alleges to be the massive and on-going violation of the Charter limitations on the use of armed force, this Court render a determination legally and functionally indistinguishable from the determination under Article 39 of the Charter of a "threat to the peace, breach of the peace, or act of aggression" — a responsibility that the text and history of the Charter reserve to the Security Council.

Nicaragua has freely conceded in its Application that its claims before the Court are identical to the claims that it urged before the Security Council under Article 39. Nicaragua must be held to that concession. It cannot escape that concession by mere artful pleading, because its consequences for the admissibility of the Application are fundamentally substantive and cannot be cured on the facts that Nicaragua alleges in its Application.

Nor can the fundamental issue presented by the Nicaraguan Application be sidestepped by grounding the competence of this Court to act in a situation of on-going armed conflict on the asserted failure of the Security Council to act under Article 39. It must be emphasized that it is *not* that the Security Council has failed to act, but that it has failed to act *in the manner preferred by Nicaragua*. In so doing, the Security Council functioned in a manner entirely and deliberately provided for by the architects of the Charter. Nicaragua may understandably complain of this, but it is surely insufficient to give rise to a subject-matter competence that the drafters of the Charter and the Statute of the Court never intended the Court to have.

I would once again recall to the Court that the Nicaraguan Application is unlike any other that has ever before been submitted to this Court or its predecessor. Never before has this Court been asked to determine the legitimacy of an alleged resort to armed force in the very midst of an alleged armed conflict. Such matters are confided by the Charter of the United Nations to determination by the Security Council. They lie outside of the subject-matter competence of this Court.

In concluding, we would like to paraphrase what this Court has said in its Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations* (*I.C.J. Reports 1950*, p. 4, at p. 9): to hold that the Court has the power to adjudicate the central claim of the Nicaraguan Application, namely that the alleged actions of the United States constitute an unlawful use of armed force amounting to "threats or breaches of the peace, and acts of aggression" (**I**, Application, para. 12)

> "would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization."

If one should compare the issue in that case with the one facing this Court today, that statement takes on even greater force, as the functions of the Security Council under Article 39 of the Charter are certainly of far greater moment than those which it exercises under Article 4 (2) of the Charter.

For such reasons, we submit, the Nicaraguan Application is inadmissible and must be dismissed.

ARGUMENT OF PROFESSOR MOORE

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Professor **MOORE**: Mr. President and distinguished Members of the Court.

It is a privilege to appear before this distinguished Court to present a case of high importance for the future of the Charter system, the rule of law and the judicial process.

Professor Sohn has demonstrated that the Nicaraguan Application is not within the competence of the Court because it would compel the Court to exercise functions which the Charter of the United Nations reserves to the Security Council and regional dispute settlement mechanisms under Chapter VIII of the Charter.

I, in turn, will show that the issues presented by the Nicaraguan Application, whether or not they lie within the Court's jurisdiction or its competence under the Charter and Statute, nevertheless are inadmissible.

There is no more important goal in international life than strengthening the rule of law among nations. As this Peace Palace symbolizes, a strong and effective judicial process is a fundamental part of such a rule of law. The rule of law and an effective judicial process are interrelated objectives which the United States has vigorously supported throughout its history. The United States opposes this case brought by Nicaragua not, as Nicaragua would have the Court believe, because it seeks to avoid judgment based on law, but solely and precisely because it deeply believes that this case risks profound harm to the rule of law and to this Court.

Nicaragua urges, for the first time in history, that this Court adjudicate a claim centrally rooted in an armed conflict, during the course of such conflict. Moreover, and even more remarkably, Nicaragua urges this action in a setting of hostilities triggered in part by its own attacks against its neighbours and its own failure to honour solemn commitments made to the Organization of American States; where only claims important to Nicaragua would be considered; when its concerned neighbours would not be before the Court; when such adjudication would inevitably clash with a process of regional peace negotiations endorsed by the Security Council; when Nicaragua could use the Court to focus attention away from its own human rights abuses, Charter violations and the need for national reconciliation; when on-going hostilities would pose an insuperable problem in the discovery of truth and the fashioning of an effective judicial remedy; and when adjudication would pose a severe threat of inadvertent impairment of the inherent right of individual and collective defence enshrined in Article 51 of the Charter. This upside-down, and essentially political, Nicaraguan request is inadmissible whether or not the Court has jurisdiction or subject-matter competence under the Charter.

Counsel for Nicaragua have lectured the Court at length that there is no merit to any distinction based on legal and political disputes or important and unimportant cases. But right or wrong in these views they have missed the point. For the issue is not these questions but rather the independent doctrine of admissibility in all its aspects.

Just as jurisdiction reflects a fundamental principle that nations must consent to be bound by a judgment of this Court, so too admissibility reflects fundamental principles concerned with protection of the rule of law, the judicial function, and the role of this Court within the United Nations system. As the Court said in its Judgment in the *Northern Cameroons* case:

> "It is the act of the Applicant which seises the Court, but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limits on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, on the one hand, and on the other hand the duty of the Court to maintain its judicial character." (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15, at p. 29.)

Admissibility reflects many principles concerned with protecting the rule of law and the integrity of the judicial role and process. There are at least four such important principles applicable to this case. These are:

first, consistent with its settled jurisprudence, the Court should respect the legal rights and sovereign equality of third States not before the Court, whose legal interests form the very subject-matter of a case;

second, as an organ of the United Nations bound to promote the rule of law, human rights and the peaceful settlement of disputes, the Court should take no action that could interfere with regional efforts to bring on-going hostilities to an end and to guarantee fundamental human rights and a lasting peace;

third, as a principal organ of the United Nations the Court should take no action that could interfere with decisions of the Security Council or regional arrangements under Chapter VIII of the Charter; and

fourth, as the principal judicial organ of the United Nations, the Court should respect the inherent limitations of the judicial process concerning the impracticability of the discovery of truth and the fashioning of just, proportionate and effective judicial relief during on-going hostilities.

Each and every one of these principles is a fundamental requirement of the rule of law and a just and effective judicial process. Counsel for Nicaragua is right when he eloquently reminds the Court of the importance of the rule of law. He is profoundly mistaken, however, in failing to understand that that goal requires dismissing this case.

Summary of Argument

Mr. President, in my presentation today I will emphasize the following themes based, in turn, on these four principles of admissibility applicable in this case.

The first is that the Nicaraguan Application is inadmissible because Nicaragua has failed to bring before the Court other States of the region whose rights, obligations and sovereign equality would necessarily form the very subject-matter of this case. This case is centrally about the right of absent third States to receive and participate in collective defence and mutual security. The inherent right of defence guaranteed to those States by Article 51 of the Charter and the integrity of the judicial process would be impaired by their absence from the important factual and legal determinations required of any decision on the merits. Moreover, United States rights in this case derive in whole or in part from these rights of absent third States and as such could in no event be determined without prior adjudication of the legal interests of these States. This is necessarily so whatever the protestations of Nicaragua that its claims lie only against the United States or that no other Central American State has legitimate claims against Nicaragua.

The Nicaraguan Application, secondly, is inadmissible because its adjudication would necessarily constitute a material interference in the process of regionally based negotiations to end an on-going armed conflict. The Contadora process has been recognized and endorsed by the relevant organs of the United Nations and by the Organization of American States as the appropriate regional agency for the resolution of the security, human rights and related problems of Central America. Adjudication of the Nicaraguan claims in isolation from that process would severely interfere with the very objects sought to be attained by that regional mechanism. It could well prolong the regional conflict and hinder the enforcement of human rights in countries affected by that conflict. This is necessarily so whatever the protestations of Nicaragua that to date the Contadora process continues despite consideration of the matter by the Court.

Third, as a principal organ of the United Nations under Articles 7 and 92 of the Charter, this Court has a duty to defer to actions of the Security Council and regional arrangements under Chapter VIII of the Charter, in the exercise of their respective competencies. And the Court must not take measures that would render meaningless, or otherwise interfere with actions of those organs. In this case, Security Council resolution 530 of 19 May 1983 urges interested States to co-operate fully with the Contadora Group in resolving their differences. And the Assembly of the Organization of American States, in its resolution of 18 November 1983, requested all States to abstain from any act that may:

> "Hamper the negotiation efforts the Contadora Group is making in mutual agreement with the Central American Governments, or impede the creation of a climate of dialogue and negotiations conducive to the restoration of Peace in the region."

Accordingly, this Court is bound, as a co-ordinate organ under Article 7 and Article 92 of the Charter, not to take action incompatible with the carrying out of these resolutions. No appraisal of the peace effort in Central America is at all realistic which fails to note the central role played by the Contadora process as endorsed by the Security Council, the General Assembly, the Secretary-General, the Organization of American States and the Contadora States — indeed, all concerned States and international organizations. No responsible authority or even another State — only Nicaragua for its own ends — has sought to interject this Court into the Central American conflict during the Contadora process. Contrary to the representations of Nicaragua there is far more involved here than the mere concurrence of negotiations.

Finally, the Nicaraguan allegation of on-going unlawful use of force that forms the centrepiece of its Application cannot be adjudicated if this Court is to fully perform its role as a judicial organ. For it is virtually impossible during on-going hostilities to avoid severe difficulties in access to information and the fashioning of appropriate relief. Nicaragua denies in these proceedings that it is or has been engaged in an armed attack on its neighbours. Yet the very United States Congressional Committees which it cites as proof of its allegations of United States involvement reached the opposite conclusions. El Salvador also has claimed otherwise in its Declaration of Intervention before this Court (**II**, p. 451), and other Central American States have gone on record with similar complaints. Indeed, one need only compare the affidavit of the United States Secretary of State with that of the Nicaraguan Foreign Minister to appreciate the depth of these difficulties. A judicial tribunal is, furthermore, simply not equipped to fashion relief that can effectively encourage an end to hostilities without impairing the right of defence while hostilities continue.

For each of the foregoing reasons, and overwhelmingly for their cumulative effect, the United States submits that the Court should find the Nicaraguan Application inadmissible.

Argument

Mr. President, let us now look more closely at each of these four problems as they apply to this case.

The first objection to the admissibility of the Nicaraguan Application is that Nicaragua has failed to bring before the Court third States whose legal interest form the very subject-matter of this case and whose presence is essential for the reliable functioning of the judicial process. The presence of those third States is necessary to avoid irreparable harm to the legal interests and sovereign equality of those States. Their presence is also necessary to permit the Court to fully develop the facts and law necessary to any judicial determination of the respective rights and duties of the United States and Nicaragua.

It is settled jurisprudence of this Court that an Application is inadmissible if it must necessarily adjudicate the legal rights and obligations of absent third States without their express consent or participation in the proceedings before the Court. This rule was first formally articulated by this Court's predecessor in the *Eastern Carelia* case and has been restated by the Court on numerous occasions, including particularly the *Monetary Gold* case. In *Monetary Gold* and again recently in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court stated the test to be whether "the legal interest" of the third State "would form the very subject-matter of a decision". Indeed, Nicaragua in its Memorial and oral argument concedes this is the applicable standard.

But what could more clearly form the very subject-matter of the case where claims concerning the right and duty of collective defence on behalf of an absent third State or the lawfulness of actions of other absent third States in support of collective defence form the core issue? The United States submits that if this Court must defer to a single absent State when the stake is simply abstract liability, as in *Monetary Gold*, the duty of deference is immeasurably greater when the inherent right of collective defence, self-determination, and possibly even national survival of many States of a region is at stake. Moreover, in this case the presence of non-participating third States with their important perspectives and base of factual information on the core question to be decided, is essential for the reliable functioning of the judicial process on that core question. This is so quite apart from protecting the interests of those third States.

Nicaragua seeks to engage this Court for a determination of what it alleges to be the international responsibility of the United States for a variety of alleged unlawful activities, but all of which ultimately reduce themselves to a claim of unlawful resort to armed force. In so doing, however, Nicaragua has irrefutably implicated absent third States in those alleged activities. Assertions to the contrary made by Nicaragua in oral argument are belied by the Nicaraguan Application itself. Honduras, in particular, is singled out for emphasis. To give just a few examples, in paragraph 2 of the so-called "Chronological Account" annexed to the Nicaraguan Application it is alleged that an "army was to be recruited from Nicaraguans living in Honduras". In paragraph 5 it is alleged that "the . . . army was recruited and trained in Honduras", in particular at a Honduran military base. And in paragraph 10, it is alleged that weapons and supplies delivered to Honduras were moved to the Nicaraguan border by "the Honduran armed forces". And so on.

At this stage of the proceedings the United States cannot address the falsity of these allegations. They are recited only as illustrative of the Nicaraguan allegations of unlawful activity on the part of Honduras, a State that Nicaragua has failed to bring before the Court. As my colleague, Mr. Norton, has shown, similar allegations have also been made by Nicaragua against Costa Rica, yet another State not before the Court.

It is settled law that a State that permits its territory to be used for the commission of internationally wrongful acts against another State itself commits an internationally wrongful act. The United States would observe, in connection with the specific allegations made by Nicaragua, that Article 3 (*f*) of the 1974 Definition of Aggression provides:

> "The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State for perpetrating an act of aggression against a third State"

qualifies as an "act of aggression" if so determined by the Security Council. The Court cannot determine the international responsibility of the United States for the alleged activities set forth in the Nicaraguan Application without, at the same time, reaching a determination as to the responsibility of third States not present before the Court.

Moreover, the Nicaraguan Application asks in particular that the United States be ordered to desist "from all support of any kind" — specifically including security assistance — to "any nation . . . engaged in military or paramilitary actions in or against Nicaragua". This presupposes precisely that sort of determination the need for which Nicaragua now denies, namely, that the States concerned are not engaged in the exercise of the inherent right of individual or collective defence recognized and guaranteed by Article 51 of the Charter. As El Salvador noted in its Declaration of Intervention under Article 63 of the Statute of the Court, filed on 15 August:

> "it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining the legitimacy or legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua."

This statement occurs at page 456 of the Salvadorian Declaration (**II**), following a detailed recital of certain of the hostile actions directed at El Salvador by Nicaragua.

The Court adjourned between 4.15 p.m. and 4.30 p.m.

Mr. President, before the break the United States was addressing the first reason why the Nicaraguan Application is inadmissible: that is, that it necessarily affects the legal interests of States not before the Court whose interests form the very subject-matter of this case. Nicaragua cannot ask this Court to enjoin the United States from co-operating with States not before the Court, and at the same time deny that that injunction would entail a determination of the international rights or responsibilities of those absent States. The alleged actions of the United States are either lawful under the Charter, or they are not. If they are unlawful, then for the reasons stated above it follows that the actions of those absent third States must also be unlawful. If they are lawful then those States have a right to receive assistance from other States under Article 51 of the Charter. Moreover, receiving such assistance against an armed attack is not only their right but their "inherent" right which, under the binding terms of Article 51 of the Charter, cannot be impaired. It is evident that a great deal more than some abstract legal interest of those non-participating States would necessarily be jeopardized; indeed their very security would be threatened. Yet those States are not before the Court and therefore cannot establish the lawfulness of their actions as Nicaragua has alleged those activities factually, nor in any other manner protect their rights under Article 51 of the Charter.

It should also be noted that the right of the United States to act in collective defence derives, in whole or in part, from the right of States in the region not present in these proceedings to act in self-defence. Thus, the full rights of the United States cannot possibly be adjudicated without first determining the rights of other States in the region not before the Court.

It is irrelevant to argue that those absent States could, if they wished, submit themselves to the jurisdiction of this Court in order to establish the lawfulness of their actions. The affected States of the region may have many reasons for not wanting to participate in Nicaragua's adjudication; indeed, all have strongly expressed their concern about interference with the Contadora process. But whatever their reasons, it is a cornerstone of the jurisprudence of this Court that no State may be compelled to submit to the jurisdiction of the Court unless it consents, and that the Court cannot adjudicate the rights and obligations of a non-consenting State. The *Monetary Gold* case makes this clear.

Similarly, it is no answer, as Nicaragua asserts, that under Article 59 of the Statute a decision between Nicaragua and the United States would not be binding on absent third States. In the *Monetary Gold* case the Court specifically considered and rejected this argument (*I.C.J. Reports 1954*, p. 18).

And it is no answer to argue that these issues depend on determination on the merits. The issue is the fairness and completeness of factual and legal determinations made without the participation of States whose legal interests form the very subject-matter of this case. Any determinations made without such participation could not possibly be full or fair. In short, no case can be properly constructed without the naming in the Application of all necessary parties from the outset.

It should be stressed that in this case, as in the *Monetary Gold* case, the absence of the third States in question would prevent the full development of facts and law necessary for a determination of the rights and obligations of the United States and Nicaragua. The lawfulness of the alleged actions of the United States in concern with those States must in large measure turn on whether those States are engaged in the exercise of their Article 51 rights in calling upon the United States to furnish necessary and proportional assistance to enable them to respond to Nicaragua's own activities against their territorial integrity and political independence. That in turn necessitates a determination of the facts concerning Nicaraguan activities in and against those absent States. Evidence concerning those facts may not be in the possession or control of any party now before the Court. As was acknowledged as long ago as 1923 by the Permanent Court in its Advisory Opinion in the *Eastern Carelia* case, such questions of material fact cannot be legitimately and fully determined in the absence of States capable of furnishing evidence sufficient to enable the Court to arrive at a "judicial conclusion" with respect to such questions (*P.C.I.J., Series B, No. 5*, at p. 28). The Court in this case should not be required to make determination of the fact or law of such fundamental consequence, not only to the United States and Nicaragua, but to States not before the Court, on the basis of a partial record.

Examining a hypothetical case might assist in clarifying the startling proposition advanced by counsel for Nicaragua that El Salvador, Honduras and other Central American States have no legal interest in this case because, counsel argues, Nicaragua makes no claim against these States. If, during World War II, Germany sought an order from an international court seeking to end all United States military operations against Germany, would it not seem surprising to someone in France, the Netherlands, Poland, the United Kingdom or the USSR to hear it argued that their rights would not be affected by such an order? Would they not be further startled to hear it argued that the United Kingdom and the USSR had no legal interest in the proceedings despite repeated allegations in the hypothetical German pleadings that the United Kingdom and the USSR had permitted use of their territory for attacks against Germany? The Court should note that in this hypothetical example the United Kingdom's and the USSR's legal rights and obligations are fundamentally at stake whatever the factual outcome of the case. Thus, if Germany is found to be acting unlawfully, the United Kingdom's and the USSR's fundamental right to receive collective defence — and those of any other State in the example — were clearly at stake in the proceeding without their presence or right to be heard. And if the United States were found to be acting unlawfully then clearly this finding would directly implicate the United Kingdom and the USSR, again without their presence or right to be heard. Since the facts and legal outcome cannot be known in advance — or even if they were it would make no difference as to whether the United Kingdom's and the USSR's rights and obligations were squarely in issue — the case should be inadmissible without the participation of these States whose interests form the very subject-matter of the case.

Although the United States relies on the settled jurisprudence of this Court, counsel for Nicaragua are unduly provincial in asserting that the concept of protecting the rights of third parties is peculiarly American. The principle that fairness requires that a Court must not adjudicate matters that necessarily affect the rights and duties of parties not before the Court is not only settled jurisprudence of this Court but is also a general principle of law recognized by nations within the meaning of Article 38 (1) *(c)* of the Statute. It is adhered to not only in common law countries where the absence of an "indispensable party" is a bar to adjudication, but it is also recognized in the codes of civil procedure of the so-called civil law countries. See, for example, the *Code of Civil Procedure of the German Federal Republic*, Section 62. According to that provision failure to join a party defendant in the case of a necessary plurality of parties defendant (Notwendige Passive Streitgenossenschaft) entails dismissal of the action as inadmissible (Unzulaessig) (cf. Rosenberg, *Lehrbuch des Deutschen Zivilprozessrechts*, 8th ed., 1960, Sec. 94, pp. 426 *et seq.*). Similarly, according to Professor Ernst Cohn, writing in the *Encyclopedia of Comparative Law*, "compulsory plurality of parties" is a recognized concept in most legal systems of the world, including Brazil, France, Germany, Italy, Sweden and the Socialist countries, just to give only a partial summary of jurisdictions. (See E. Cohn, Chapter V, "Parties", Secs. 147-156, in *Encyclopedia of Comparative Law*, Vol. 16, "Civil Procedure".)

The central consideration here is one of fundamental fairness in the judicial process and the rule of law: fairness in *legal effect*, because a judgment on the merits in the circumstances of the case as alleged by Nicaragua would inevitably involve a determination of the legal rights and obligations of States not before the Court. Fairness in *argumentation*, because the full development of the legal questions posed by the Nicaraguan claims cannot be reached without the participation of all States alleged to be actively involved in the circumstances giving rise to those claims. And fairness in *discovering truth and proving facts*, because the two Parties now before the Court cannot be presumed to possess and control all the evidence necessary to permit a judicial conclusion as to the existence, or non-existence, of the facts relevant to the Nicaraguan claims.

Mr. President, I will now turn to the second point of the United States, namely that adjudication of the Application would materially and directly interfere with an on-going process of negotiations designed to end the Central American conflict, to foster human rights and national reconciliation, and to ensure a lasting peace in the region. I am speaking, in particular, of the Contadora process which includes, among its agreed aims, objectives directed to the very claims and issues raised by the Nicaraguan Application.

It may be useful at the outset to briefly remind ourselves of the legal basis for this aspect of inadmissibility. Under Articles 7 and 92 of the Charter this Court is an organ of the United Nations and its Statute is an integral part of the Charter. As such, as counsel for Nicaragua have noted, within its general competence this Court is bound to promote the purposes and principles of the United Nations including maintenance of international peace and security and respect for human rights and fundamental freedoms. If, then, judicial action in a particular case would risk substantial interference with a universally endorsed process of negotiations to achieve these Charter principles, the Court should declare the case inadmisible.

As demonstrated in paragraphs 532 to 535 of the United States Counter-Memorial (**II**), the Contadora process has been endorsed by the Security Council, by the General Assembly of the United Nations, and by the General Assembly of the Organization of American States. The Contadora process is, in sum, the internationally recognized mechanism for the resolution of Central American regional disputes.

Mr. President, let me emphasize that the United States strongly supports the Contadora process as the most promising route to peaceful settlement in Central America and particularly welcomes the draft Acta of 7 September 1984, as evidence of real progress in these negotiations. Costa Rica, El Salvador, Guatemala and Honduras have all made clear in public statements including those before the United Nations General Assembly that this revised draft requires further negotiation and revision. The Contadora Group countries themselves have indicated that perfecting changes still need to be made. Nonetheless, the 7 September version evidences genuine movement towards a comprehensive, verifiable regional accord. It must further be emphasized that the Contadora process has, among its aims, resolution of the very security concerns that lie at the heart of the Nicaraguan Application. The 21-point Document of Objectives, agreed to at Panama in September 1983 by all nine countries participating in the Contadora process, including Nicaragua, constitutes a comprehensive listing of the bases for regional peace and security.

A recital of the principal security-related provisions of the Document of Objectives is found at paragraphs 538 and 539 of the Counter-Memorial (**II**), and need not be repeated here. Suffice it to observe that those objectives address such matters as foreign military bases and advisers, machinery to control the traffic in arms, the prohibition of assistance and sanctuary to guerrilla groups, and the prohibition of acts of terrorism, subversion and sabotage. All of Nicaragua's security-based claims before this Court are thus embraced by the Contadora objectives. In addition, those objectives include others not raised in this Court by Nicaragua, including the need to bring a halt to the arms race in the region — an objective that reflects the fact that since 1979 Nicaragua has steadily and deliberately increased its military establishment to the point where it is by far the largest in Central America, in percentage of the population, comprising fully 5 per cent of the Nicaraguan population, and in terms of Central America as opposed to Latin America, it is the largest in Central America.

Indeed the Contadora process is far broader than Nicaragua's claims. It addresses the security concerns of all States in the region. It addresses agreed regional human rights concerns, including those concerning the as yet unfilled pledges made by the Nicaraguan Government to the Organization of American States in 1979 concerning free elections, national reconciliation, and democracy. And it addresses the regional military balance and other conditions necessary for long-term peace and stability.

This case presents at least three substantial concerns as to interference with the Contadora process. First, the Contadora process is a balanced package approach. It includes not only security concerns of interest to Nicaragua but an interlinked set of security, human rights and other political commitments each State would have to give to all other States of the region.

There has been one essential characteristic of the Contadora negotiations since early 1983: a consensus that only a balanced, reciprocal set of commitments engaging all issues and all countries carries any hope of bringing about a durable peace. Compromise has been necessary in the negotiations thus far and will be necessary to produce an Acta fully acceptable to all participants. Compromise and balance will also be needed even after an Acta enters into force, in order for its essential verification and control mechanisms to function. Any change in the circumstances which would unbalance the commitments to favour one or another country would prejudice the chances for a successful negotiation and implementation of the Acta.

Yet Nicaragua is asking this Court for a judgment that would meet Contadora security objectives only as they may relate to Nicaragua's concerns without regard to any obligations that Nicaragua may have agreed to assume vis-à-vis other countries participating in the Contadora process. If this relief were granted, the reciprocity and mutuality that lie at the heart of the Contadora process would be directly and materially frustrated. Nicaragua would achieve its goals and, having done so, no longer would have any incentive to agree to limitations on its own military and paramilitary structure and activities, including its support of armed groups seeking the destabilization of neighbouring governments. Indeed, the very possibility that Nicaragua could achieve some of its Contadora objectives in another forum could jeopardize negotiations. It is significant that Nicaragua is the only member of Contadora that has sought to use this Court in the current dispute. Adjudication of the security-related claims of Nicaragua, and of Nicaragua alone, would not merely be inconsistent with the Contadora framework to which Nicaragua has agreed, it would be flatly incompatible with it.

An examination of the 7 September draft — even though it is not a final text — makes clear the impact of adjudication of Nicaragua's claims before this Court. Such adjudication would engage some commitments but not others. It would change the circumstances affecting negotiations or implementation in different ways for different countries. One or more of the five countries held together by a mutual sense of compromise may well find its national interests directly and unfairly challenged.

Seven of the nine draft commitments in the first Chapter ("General Commitments") of Part I of the 7 September version can be logically related to Nicaragua's claims before the Court. But the impact of adjudication, no matter what the eventual decision, would be severely differential. Thus, the commitments therein on territorial integrity, international boundaries, coercive or destabilizing acts and the use or threat of force, would be engaged by adjudication essentially with regard to actions against Nicaragua — and not the same actions aimed at other Central American States.

Similarly, 19 of the 28 draft commitments in Chapter III ("Commitments relating to Security Matters") can be linked to Nicaraguan claims. These have to do with military manœuvres, security assistance, military advisers, arms trafficking, support for irregular forces, subversion and terrorism. The impact of adjudication could be favourable in these areas to Nicaragua and unfavourable to other States, particularly Costa Rica and Honduras. Significantly, one of the areas which would not be engaged by adjudication is that relating to the restoration of military balance in the area. Unlike other security issues, this one has not been important to Nicaragua, the country with the largest military establishment in Central America. Thus, both country-to-country balance and the balance among various security issues could be lost.

In contrast, adjudication would not engage draft Chapter II ("Commitments relating to Political Matters") or draft Chapter IV ("Commitments on Economic and Social Matters") at all. It is worthy of note that Nicaragua has consistently rejected regional and international reminders of its pledges with regard to national reconciliation, democratic pluralism and human rights — matters of intense concern particularly to Costa Rica and the Organization of American States as a whole. As with the military balance issue, Nicaragua has only been engaged toward legal commitment on these elements by the balancing dynamic of the Contadora process. Adjudication, by concentrating on security matters of interest to Nicaragua, would shift the balance away from these important political issues.

Second, this case — which focuses solely on the interests of Nicaragua to the exclusion of other regional parties to the Contadora process — could well directly interfere with the specific implementation and verification mechanisms essential to the success of that process.

Part II of the draft Acta deals with "Commitments relating to Implementation". This is a critical issue for all concerned. A clear consensus has developed within the Contadora process that an effective, enduring settlement of the conflict in the region not only has to be reciprocally binding on all Parties, but must be subject to verification and control as well. This requirement is explicitly delineated in the Document of Objectives of September 1983. And the need to revise the 7 September draft Acta to provide for specific verification mechanisms equal to duties assigned to them has been emphatically stated by the Central American States — with the exception of Nicaragua. The eloquent statement of El Salvador's President Duarte before the United Nations General Assembly of 8 October is particularly worth noting.

Without satisfactory verification mechanisms, there can be no confidence among Nicaragua's neighbours that Nicaragua will in fact live in peace with them. That confidence is essential to achievement and implementation of any agreement to end the conflict in Central America.

This requirement for verification places in relief the significant contrast between the Court's inability to verify compliance with the measures that Nicaragua demands, on the one hand, and the emphasis the other Contadora participants have placed on effective verification and control, on the other.

International verification and control is a difficult, time-consuming and expensive task. Experiences such as those in post-1954 Indochina and in the Sinai have highlighted what can be described as the basic problem: designing a monitoring process and making circumvention of agreed arrangements more difficult and costly. Both passive and active verification measures are generally considered necessary. Typical passive measures include exchange of information on observance of limitations on numbers and types of troops and weapon systems, rules for counting foreign military advisers, and timely reporting of successful actions in terminating subversive activities. Active measures include various forms of on-site inspection in a country and means to ensure that such inspection can be effectively carried out.

The 7 September draft also includes an "Annex" defining a number of verification and compliance terms. These include such areas as the classification of weapons, characteristics of aircraft and ships, and details on types of security, naval, air, land and paramilitary forces. One characteristic of arms control agreements is that such definitions are frequently of critical importance for verification and compliance and can spell success or failure of an agreement. Adjudication could create a competing set of standards, with focus on those terms and concepts of special interest to Nicaragua.

Given the widely recognized complexity of verification and control mechanisms, and the consensus within the Contadora process that such mechanisms are a *sine qua non* of a durable peace, the choice between Court action and Contadora getting on with its work cannot be clearer.

For the benefit of the Court in examining these potential problems, the United States has filed the recent draft Acta of 7 September 1984 with the Court.

Finally, the existence of a case before the Court, which would of necessity be of the utmost concern to States in passing on their fundamental legal rights and obligations, could harden the position of the parties and cause them to review all actions in strictly legal terms even when negotiations call for greater flexibility. It might be recalled in this connection that counsel for Nicaragua have already sought to exploit the peace mission of an American Secretary of State by suggesting that this case, and not the importance of a solution to the conflict in Central America, was the motivating factor.

It must be stressed what a remarkable diplomatic achievement the agreement-to-agree that is embodied in the 21-point Document of Objectives and the draft Acta represents. Nine States — the four Contadora States and the five Central American States — reached a consensus on a comprehensive approach to the problems besetting Central America, problems which go well beyond the unilateral security concerns singled out by Nicaragua before this Court. The draft Acta represents a welcome step toward achievement of those objectives. Adjudication of only one element of that comprehensive framework, and as that one element is perceived by only one of the nine States involved, risks the careful balance that has thus far been so painstakingly pursued.

Thus, what is at stake here is far more than an inchoate possibility that judicial abstention would "create a more favourable political climate for an agreed settlement" which, in the *Aegean Sea Continental Shelf* case, the Court considered as insufficient ground for declining to adjudicate. Rather, what is at risk is a comprehensive, integrated process to which Nicaragua and eight other States are party. That process has now produced a detailed draft Acta as a step toward a binding regional agreement. That process enjoys the firm support and encouragement of the United States. And that process has been endorsed — and is the only process so to be endorsed — by the Security Council and General Assembly of the United Nations and the General Assembly of the Organization of American States. In the interest of the success of that process, this Court should decline to adjudicate Nicaragua's claims.

Nicaragua's response to this second problem of admissibility, would, but for the seriousness of the issue, approach the ludicrous. It asserts that the Court must disregard the problem because the United States is not a party to Contadora. Not since the great German jurist Rudolph von Jhering's mythical hair-splitting machine in the heaven for legal theoreticians has hair-splitting achieved such splendid irrelevance (see F. Cohen, "Transcendental Nonsense and the Functional Approach", 35 *Columbia L. Rev.* 809 (1935)). The United States is not a participant in Contadora for the simple reason that it should not be. The Contadora process is the result of the efforts of those Latin American States who desired to join in a co-operative Latin effort to achieve a regional solution to the political, economic, social and security problems of Central America. The United States has offered, and continues to offer, the strongest support to the Contadora process consistent with its regional character. Indeed, the United States has been engaged, at the request of the Contadora countries, in bilateral diplomatic discussions with Nicaragua with a view to resolving the outstanding differences between our two countries in furtherance of the objectives of the Contadora process.

Nicaragua does point out correctly that the Contadora process and United States-Nicaraguan bilateral negotiations linked to Contadora have not come to a halt since its Application has been filed. But again, that fact establishes nothing about the effect its Application has had on Contadora, what effect a decision to deal with this case on the merits would have, and what effect a judgment would have on Nicaragua's or other Central American States' incentives to continue Contadora, or on prospects for implementation of the draft Acta. Indeed, Nicaragua's argument, in the real world of multiple causes, is the familiar logical fallacy of *post hoc ergo propter hoc*.

The third reason why the Nicaraguan Application should be declared inadmissible relates to the duty owed by the Court, as an integral element of the United Nations, to the other co-ordinate organs of the Organization, in particular, the Security Council.

As we have seen, Article 92 of the Charter establishes the Court as the "principal judicial organ of the United Nations" and makes its Statute "an integral part of the present Charter". Article 93 (1) underscores this by providing that all Members of the United Nations are *ipso facto* parties to the Statute of the Court. Article 7 of the Charter establishes the Court as one of the "principal organs" of the United Nations. Article 1 of the Statute of the Court reiterates that the Court is an "organ of the United Nations". This Court differs in this respect from the Permanent Court of International Justice, which existed independently of the League of Nations.

The Charter of the United Nations created an organization made up of several distinct organs, each with its own particular competence. The proper functioning of any organic system such as the United Nations, the Organization of American States or the Organization of African Unity, depends on each of the constituent organs operating within its respective competence and with due regard for the designated spheres of action of the others. The Charter provisions governing the competence of the Court, already described by Professor Sohn, offer no basis for a conclusion that the Court should be regarded as an exception to this general principle. As Professor Rosenne has written:

> "It cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of co-operation between them in the pursuit of the aims of the Organization.
>
> This approach opens the way to a functional conception of the task of the Court in its capacity of a principal organ of the United Nations, according to which, subject to overriding considerations of law (including judi-

> cial propriety), the Court must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of the other principal organs, and not achieve results which would render them nugatory." (*The Law and Practice of the International Court*, 1965, Vol. I, pp. 69-70.)

Nicaragua's effort to use the Court in this case would run counter to the decision already taken by the Security Council and the Organization of American States in endorsing the Contadora process.

Security Council resolution 530 (1983) singles out the Contadora Group as the appropriate forum for settlement of Central American regional disputes. Indeed, the Contadora Group is stressed in three of the five operative paragraphs of the resolution, and the resolution unequivocally urges "interested States to co-operate fully with the Contadora Group". In his note of 18 October 1983, the Secretary-General of the United Nations focuses exclusively on the Contadora process in reporting to the Council on peace efforts in Central America pursuant to this resolution.

The Organization of American States Assembly is also clear, in its resolution of 18 November 1983, on "Peace Efforts in Central America". In this resolution it focuses exclusively on the efforts of the Contadora Group and concludes in paragraph 7 by requesting all States "to abstain from any act that may . . . hamper the negotiation efforts the Contadora Group is making in mutual agreement with the Central American Governments".

Neither the Security Council nor the Organization of American States has acknowledged any role for judicial settlement in respect of this dispute, as the Council did in both the *Corfu Channel* and *Diplomatic and Consular Staff* cases. Presumably, if they had thought that a judicial proceeding would contribute to the peace effort or that it would not conflict with the Contadora process, they could easily have said so. Instead, both endorsed the Contadora process exclusively, as of course comports with the negotiating reality in the region. Counsel for Nicaragua seeks to make much of the fact that neither the Security Council, the General Assembly, nor the Organization of American States has declared the Contadora process to be, in so many words, the "exclusive" mechanism for achieving a regional settlement. But this is a quibble that ignores the entire context of decisions by these bodies. There is not a shred of evidence that any of these bodies considered it even a possibility that this Court might supplant that process, in whole or in part.

For the Court to interfere with the Contadora process as endorsed by the Security Council in its resolution 530 of 19 May 1983 would threaten implementation of that body's resolution and would frustrate a decision taken by a co-ordinate organ acting within its sphere of express competence.

There is also a second way in which an adjudication of Nicaragua's claims could render nugatory a decision of the Security Council. As demonstrated by Professor Sohn, the scope and nature of Nicaragua's claim is identical to the claim that Nicaragua put before the Security Council a mere five days before instituting proceedings in this Court. Nicaragua admits this. Having been unsuccessful in its attempt to have the Security Council determine, on the basis of those identical claims, the existence of a "threat to the peace, breach of the peace or act of aggression", Nicaragua is now asking this Court for a judgment that would be in all material respects identical to the decision that the Security Council did not take. The Security Council, in declining to make that determination, was acting squarely within the competence specifically and deliberately vested in it by the Charter — nor is that competence changed one whit because non-adoption resulted from a failure to obtain the majority required by Article 27 of the Charter.

Nicaragua's Application can thus hardly be distinguished from an unprecedented appeal to this Court from an adverse consideration in the Security Council. There is no basis in the Charter for such an extraordinary action; indeed, as has already been shown, the drafters of the Charter expressly rejected a proposal that would have permitted review by this Court of Security Council actions.

Nicaragua relies on a number of decisions of this Court and its predecessor. A careful examination of those decisions, however, shows that they offer no support whatever to the Nicaraguan position in this particular case.

Two of those decisions, *Memel* and *Minority Schools*, were cases before the Permanent Court which, not being a co-ordinate organ of a general international organization, was under no comparable institutional constraints. Moreover, the jurisdiction of the Court was grounded in each case in paragraph 1 of Article 36 of the Statute of that Court; each involved a Special Agreement providing for the referral of certain disputes arising thereunder to the Court, and for the referral of certain other disputes to the Council of the League of Nations. This point was of controlling significance to the Court. The Court held in both, not that it could exercise jurisdiction over a matter under consideration in the Council, but that the questions before the Court and Council were in fact different, hence no issue of conflicting competences arose. Indeed, the Court in *Minority Schools* suggested that even the agreement of the parties would not be sufficient to permit the Court to adjudicate "cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority" (*Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 23).

The case on which Nicaragua appears to place the greatest reliance, however, is that of *United States Diplomatic and Consular Staff in Tehran, Judgment* (*I.C.J. Reports 1980*, p. 3). But that case is irrelevant to the issue before this Court.

First, the Court in that case was not called upon to determine the existence of an unlawful use of armed force or any other matter reserved to the Security Council under the Charter. The United States made that absolutely clear in opening its oral argument before the Court (*I.C.J. Pleadings, Diplomatic and Consular Staff in Tehran*, p. 24) and the Court expressly recognizes that in its Judgment (*I.C.J. Reports 1980*, p. 44).

Second, the claims of the United States, and the jurisdiction of the Court, were grounded in certain bilateral and multilateral treaties to which the United States and Iran were both party. In other words, as in *Memel* and *Minority Schools*, the subject-matter before the Court was before the Court by virtue of the prior agreement of the parties. No question of the scope of the Court's jurisdiction under Article 36 (2) of its Statute was presented.

Third, and also as in *Memel* and *Minority Schools*, the questions before the Court and the Security Council in the *Diplomatic and Consular Staff* case were entirely separate and distinct. The Court was called upon to decide whether Iran was in breach of its obligations under certain international agreements in so far as the treatment of diplomatic and consular personnel was concerned; the Security Council had before it the question of a threat to the maintenance of international peace and security. The question before the Court in *Diplomatic and Consular Staff* was entirely separable from the larger political controversy claimed to exist by Iran; in this case the matter sought to be brought before the Court is identical to, and co-extensive with, Nicaragua's claims before the Security Council.

Lastly, the Security Council expressly recognized, in its resolution 461 (1979), the compatibility of measures being pursued before the Court with actions being taken by the Security Council. That is, of course, precisely the opposite of this case, where by Nicaragua's own admission the Security Council has rejected the claim that Nicaragua has now put before this Court.

Counsel for Nicaragua have sought to argue that because the Charter includes a specific provision in Article 12 prohibiting General Assembly action "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter", and the Charter has no comparable provision for judicial action, that this proves there are no limits to judicial action in such matters. For purposes of admissibility this proves too much since the issue here is whether the Court should not interfere even if it does have jurisdiction and competence under the Charter. That is, as President Elias points out in his separate opinion in the case concerning the *Aegean Sea Continental Shelf, Interim Protection* (*I.C.J. Reports 1976*, p. 3 at p. 28), even if the Court does have competence such a parallel action "has its own problems and implications". Moreover, as applied to this case Nicaragua's argument is irrelevant, since when the Security Council has taken action, as here, that action is binding on member States under Article 25 and judicial action which would inevitably interfere with those obligations should not be undertaken. This does not present a case as to whether one organ should wait for another in the exercise of its functions since here the Security Council has acted and adjudication would inevitably interfere with that action. Furthermore, the Security Council has refused to adopt the very position Nicaragua seeks to assert in this proceeding. Finally, there is an identity of issues between Nicaragua's claims in the Security Council and its claims before the Court.

The Court might want to keep in mind that decisions of the Security Council are binding on member States under Article 25 of the Charter. Judgments of the Court are binding on the parties under Article 94 of the Charter and Article 59 of the Court's Statute.

Thus, the Court should refrain from acting where the obligations that its Judgment may impose on States in their character as parties to a case before the Court could conflict with obligations imposed upon them in their character as member States by a previous decision of the Security Council.

In short, this case represents an unprecedented request that the Court render the very determination that the Security Council of the United Nations, acting within the competence specifically conferred on it by the Charter, would not make. And its consideration would pose a serious risk of undermining the particular process of peaceful settlement exclusively stressed by the Security Council, the General Assembly and the Organization of American States. Adjudication of the Nicaraguan Application would interfere with a binding Security Council decision, involve the Court in an interference with the function of a co-ordinate organ of the United Nations, and pose a potentially serious clash between obligations of member States to resolutions of the Security Council, and of parties to judgments of the Court. We submit that these are compelling reasons for this Court to dismiss the Application.

Mr. President, a fourth reason for dismissal of the Nicaraguan Application is that selective adjudication of core issues concerning major hostilities while those hostilities are on-going clearly lies outside the proper scope of the judicial function and their attempted adjudication could only damage the judicial process.

Article 92 of the Charter and Article 1 of the Statute establish that this Court is a "judicial" organ. Performance of the judicial function implies a context in which essential factual determinations can be made with confidence and in which remedies effectuating all of the applicable legal rights of concerned States can be formulated and implemented.

The question of whether this or any international tribunal is an appropriate forum for resolution of complex war-peace issues is not a new issue. Scholars dedicated to the rule of law have long discussed the issue and have overwhelmingly concluded that such adjudication is inappropriate and could harm efforts at peaceful solution and erode the rule of law and the institution of the Court. My former colleague on the Faculty of Law at the University of Virginia, Hardy Dillard, while a Judge of this Court, recognized these inherent limitations of the judicial process. He wrote:

> "there are many controversies that have a legal component yet do not lend themselves to adjudication. Litigation represents only the war side of law, and to exaggerate its role may have a chilling effect on the effort to use law more effectively" ("The World Court: Reflections of a Professor Turned Judge", 27 *Amer. Univ. L. Rev.* 205, 231 (1978)).

Professor Chayes has also recognized the inherent limitations of the judicial process, as my colleague Professor Sohn has pointed out.

It is essential to bear in mind that Nicaragua is requesting that the Court determine, in the very midst of hostilities, the lawfulness of the alleged use of force. This Court has never before been called upon to play such a role, for which this or any other judicial body is inherently unsuited. As Professor Sohn has demonstrated, the architects of the Charter were mindful of the experience of the League of Nations and reflected deeply over the question of what mechanisms were necessary for the maintenance of international peace and security. They deliberately chose to vest sole responsibility for dealing with such matters in the political organs, in particular the Security Council and regional arrangements acting under Chapter VIII of the Charter. It never occurred to the drafters of the Charter that the judicial function was capable of dealing with circumstances of on-going armed hostilities. It is indeed odd that, six decades after the establishment of a permanent international court and four decades after the institution of the Charter system for the maintenance of international peace and security, it is for the first time asserted that the Court has possessed such a capability all along.

The judicial process is inherently incapable of addressing circumstances of active hostilities for the reason that the intense fluidity and extreme nature of such circumstances would inevitably prevent a court from performing its assigned role as a "finder of fact" and "discoverer of the truth".

First and foremost, the function of a court is to evaluate competing legal claims by means of the application of principles of law to facts that are both provable through the technical and formal procedures and evidentiary standards essential to proofs at law, and that are in fact proved by those means. But the conditions that prevail during armed conflict are antithetical to the effective performance of that function.

None of the parties engaged in armed hostilities can be expected to make available in judicial proceedings potentially probative information that it determines it must strictly control for reasons of effective defence, even if the production of that evidence would be crucial to the establishment of its legal case. It cannot reasonably be expected that a State, acting in the exercise of its inherent right of individual or collective self-defence under Article 51 of the Charter, would always be free to disclose information that it may possess concerning the nature, disposition and activities of the armed forces of the State with respect to which it is exercising that inherent right. In such settings there is obviously a potential of some such information to be used by the adversary to obtain advantage during hostilities. Such would be a cruel price for a State to have to pay to safeguard its legal rights.

It is likewise in the nature of such exigent circumstances that a State claiming to be the victim of an unlawful attack, such as Nicaragua in this case, cannot be presumed to be prepared to disclose to the Court secret information that would belie its legal claims. Certainly Nicaragua would have no incentive to do so, nor could such disclosure be compelled by the processes of this Court.

Yet a further complication is presented here. The alleged acts upon which Nicaragua bases its claims are asserted to have taken place, and to be taking place, in Nicaraguan territory or the territory of third States which Nicaragua has failed to bring before the Court, in particular Honduras. At the same time Nicaragua denies that it has used, and is using, its territory in order to launch activities directed against the territorial integrity and political independence of neighbouring States. Moreover, unlike the United States, a State with a long and deeply-felt constitutional tradition of unfettered freedom of the press and public inquiry, Nicaragua strictly controls and curtails the Nicaraguan press and otherwise curtails and controls the public dissemination of information concerning its activities and events happening in Nicaragua generally. To the extent, therefore, that the factual allegations of either Party can only be supported by publicly available evidence, the United States would be greatly disadvantaged. Indeed, Nicaragua's concentration on providing this Court with American newspaper accounts both illustrates this point and shows the amorphous nature of the alleged proofs inevitably required to be relied on if this case were to be found admissible.

To this it may be answered that the Court could take these facts into account in evaluating the probative value of any evidence Nicaragua may seek to adduce. As the Court observed in its Judgment in the *Corfu Channel* case when faced with a lesser predicament:

> "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence." (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 18.)

But the question is not so much what test may be applied to evaluate competing evidentiary claims, but whether any test at all can be sufficiently reliable in a circumstance of on-going hostilities to afford the Court an adequate factual ground upon which to reach a "judicial conclusion", to recall the phrase used by the Permanent Court in the *Eastern Carelia* case. It must be remembered that *Corfu Channel* was a much different case from that sought to be brought before the Court by Nicaragua. The Court in that case was not faced with the problem of securing evidence, and determining its probative value, in the very midst of the occurrences that gave rise to the British claims. Those occurrences were long over and done by the time the matter came before the Court: eight months, more or less, before the institution of proceedings and more than two and a half years before the Court reached Judgment on the merits. Indeed, as pointed out in paragraphs 481 to 484 of the United States Counter-Memorial (**II**), the fact that the *Corfu Channel* incident lay in the past was instrumental in leading the Security Council to the conclusion that the matter was appropriate for the Court to resolve, rather than for the machinery vested by the Charter with responsibility for the maintenance of international peace and security.

Armed conflict of the sort alleged in the Nicaraguan Application is inherently a situation of great flux. The determination of what may, or may not, be taking place at a given moment is invariably a matter of immense difficulty even for those who, unlike the Court, would not be constrained by the narrowly limited means available to a court of law. Newspaper accounts alone cannot be enough to sustain charges of such exceptional gravity against a State : eyewitness accounts to armed hostilities are frequently coloured by subjective factors that render them of little probative value regardless of the good faith of the deponent. These problems which exist in connection with any armed conflict are even more acute in situations as those alleged by Nicaragua where the alleged military activities complained of are those of insurgent groups having their own motivations and beyond the control of any State.

A legal judgment concerning the lawfulness of an armed conflict would only be as just as its factual predicate. In a situation of constant change, however, no such factual predicate would be of any value except, perhaps, for a discrete moment in time "frozen" by the Court on the basis of the evidence then available to it. But this would be a distortion of the judicial function to no real purpose : the *res judicata* effect of any judgment under such circumstances would be negligible. Counsel for Nicaragua argues, however, that a judgment would serve a salutory effect by serving to guide the future conduct of the parties. But in circumstances of on-going armed conflict, where the gravest of interests may be at stake, it is more likely that a party in whose favour judgment is rendered would take advantage of that judgment for its own purposes, political, military or otherwise. Thus a finding of legal "fault" may well prolong the conflict to which it relates by hardening the positions of the parties. We agree that the Court should not ordinarily be concerned over the aftermath of its judgments. We submit, however, that the compelling gravity of on-going armed conflict and the requirement in Article 51 of the Charter, binding on this Court, that nothing in the Charter shall impair the inherent right of individual or collective defence, necessitate an exception to that general principle.

Similarly, the Court is without the capacity and resources to ensure effective implementation of a judgment of the sort prayed for by Nicaragua under the conditions alleged to exist in the Nicaraguan Application. A mere declaratory judgment that had no practical consequences would hardly add to the prestige of international law generally or the role of international judicial settlement in particular. Judgments of this Court must not only be binding as a matter of law : they must be capable of achieving their intended purposes.

We submit that mere formal reliance on the obligations of the parties under Article 94 (1) of the Charter and Article 59 of the Statute to carry out the judgments of the Court is inadequate to the extraordinary conditions presented by on-going armed hostilities. As the Court acknowledged in its Judgment in the *Haya de la Torre* case in 1951, the rendering of practical guidance to the parties with respect to the implementation of a judgment, particularly where choices must be made from among a variety of possible courses of action, lies outside the proper scope of its judicial function (*I.C.J. Reports 1951*, p. 71, at p. 79). But it is exactly such practical guidance and control that is crucial to the success of any third-party effort aimed at the termination of armed hostilities. The Court has an inherent problem of scope and temporal duration of any order. The slightest error in judgment, regardless of the good faith in which it may be made, can be fraught with consequences of the utmost gravity. One need only consider the experience of the various United Nations peacekeeping operations over the years to appreciate the magnitude of the difficulties involved. It is in part for these reasons that the Charter confides such matters to the political organs, in particular the Security Council, rather than the Court. The Court is simply unable to command and direct the resources necessary to the task, or to enlist the co-operation and assistance of third States.

It must also be recalled in this connection that any judgment of the Court would have no consequences for the conduct of groups indigenous to Nicaragua that have their own motivations and that are beyond the control of any party before the Court. Nicaragua, by attempting to characterize the alleged conflict as arising solely between Nicaragua and the United States is seeking to mislead the Court as to the actual nature of its internal difficulties and their amenability to settlement by a judgment of the Court directed at the United States. This is consistent with the political objectives that have motivated Nicaraguan conduct throughout this case, including its unseemly publicity campaign that accompanied the institution of proceedings and its preposterous claim made before the United Nations General Assembly on 2 October, that the United States planned to invade Nicaragua yesterday — a day coinciding with the beginning of the United States oral argument before this Court.

Nicaragua is asking, in short, for something that this Court is simply not in a position to give. Nicaragua is asking that the Court exceed the limits of judicial propriety in a manner that could only jeopardize the prestige of the Court and of international adjudication in general. Nicaragua must not be permitted to abuse the process of this Court in that fashion.

There is yet another problem with judicial adjudication of the Nicaraguan claims concerning on-going hostilities. As we have seen Article 92 of the Charter makes the Statute of the Court, and thus its functioning, an integral part of the Charter. Article 51 of that same Charter, included in the Charter at the request of the Latin American States, makes clear that nothing in the Charter may impair the inherent right of individual and collective defence. Yet an inadvertent error in assessing on-going hostilities or in fashioning relief could severely impair that right. The great prestige of this Court would inevitably be engaged on one side or another of the continuing hostilities. Similarly, conditions may change or new facts come to light following the Court's decision, and reassessment of the Court's Judgment may, therefore, be required. The time necessary for rehearing and relief could result in substantial impairment of the right of defence, at least in terms of the substantial political benefit to one Party of the initial judicial determination.

The Court, of course, need not conclude that there are no circumstances in which the existence of on-going hostilities would not bar adjudication in order to find a bar to such adjudication in this case. If the Security Council called for adjudication rather than an established regional peace process, if the rights of absent States were not squarely at issue, if facts were stipulated, if an effective remedy were possible, and if the adjudication did not involve selective focus on core issues of interest to one party in a major on-going conflict, then adjudication might be deserving of more serious consideration if competence and jurisdiction would permit. Nicaragua's Application presents the reverse of each of these conditions.

Nor have counsel for Nicaragua provided any real answers to these inherent limitations of the judicial process. They have pointed out that eight nations out of 46 accepting the jurisdiction of the Court under the Optional Clause have some kind of reservation excluding adjudication of hostilities — four quite minor — and they have argued that this demonstrates by negative implication that the Court may adjudicate on-going hostilities. To the contrary, it is equally plausible that these reservations were made out of an abundance of caution and indeed, that they reflect a common expectation that judicial action would be impermissible just as the domestic jurisdiction reservation reflects the traditional international law rule excluding matters within a State's domestic jurisdiction. In fact, the parallel to the domestic jurisdiction reservation is striking, with 19 nations out of 46 accepting the jurisdiction of the Court having some kind of domestic jurisdiction limitation. It would be nonsense to argue that this pattern proves — or even suggests — that the Court has jurisdiction extending to the domestic matters of States not having such a reservation. Most importantly, however, this common reservation to the jurisdiction of the Court is simply irrelevant when the issue is, as it is here, admissibility and not jurisdiction.

Counsel for Nicaragua also makes an eloquent plea that it is essential in promoting the rule of law for this Court to deal with on-going hostilities, and particularly to review the actions of permanent members of the Security Council. But following the withdrawal of France only two of five permanent members of the Security Council are now parties to the compulsory jurisdiction of this Court and indeed only 46 States out of 159 Members of the United Nations have accepted such compulsory jurisdiction. Thus this argument seems more hyperbole than reality. More importantly, the greater risk to the rule of law and community policies at stake in this case relates to the fundamental constituent policies underlying admissibility, competence, jurisdiction and non-impairment of the right of defence.

Finally, counsel for Nicaragua argues that there are no factual difficulties in adjudicating on-going hostilities because the Court can serve notice on persons other than agents, counsel and advocates pursuant to Article 44 of the Statute. That is a frail reed indeed. Ambassador Rosenne writes of this Article:

> "[L]ittle experience has been gained of the working of this provision, and the view is held that it is of little value in the absence of local legislation which may be required to authorize such action." (*The Law and Practice of the International Court*, Vol. II, pp. 576-577 (1965).)

Certainly this is not a serious answer to the myriad of difficulties likely to be encountered in efforts at fact appraisal during on-going hostilities, and particularly when third States whose legal interests form the very subject-matter of this case are not present before the Court.

Because of these severe and inherent limitations on dealing with ongoing hostilities in the circumstances surrounding this case, the Nicaraguan Application should be dismissed.

Conclusion

Mr. President, if I may summarize:

The Application is inadmissible because Nicaragua has failed to bring before the Court third States of the region whose legal rights and obligations are squarely and necessarily challenged by the Application and whose presence and participation is required for fair adjudication of Nicaragua's core legal and factual allegations against the United States. There can simply be no doubt that the legal interests of these third States form the very subject-matter of the adjudication before this Court. Indeed, United States legal rights against Nicaraguan allegations are in whole or in part derivative from the rights of these absent third States.

The Application is inadmissible because it would materially interfere with the process of regional negotiations to end the conflict in Central America, a process that has now advanced to a draft treaty phase. The Application is inherently incompatible with the Contadora process, which has been recognized by the Security Council and by the Organization of American States as the proper mechanism for the resolution of the interrelated problems of Central America.

The Application is inadmissible because its adjudication would necessarily interfere with decisions already taken as well as future freedom of action of the Security Council and regional arrangements under Chapter VIII of the Charter.

The Application is inadmissible because its request for selective adjudication of core issues in an on-going armed conflict would necessarily involve the Court in matters falling outside the proper scope of the judicial function and with which judicial process is simply unequipped to deal, both with respect to the discovery of truth and the fashioning of an effective judgment. Moreover, any inadvertent error in overall fact assessment or fashioning of relief would pose a severe risk of impairing the inherent right of individual and collective defence and of impairing on-going efforts at peaceful settlement of all the security, economic, human rights, and other political problems of the region. Nicaragua is asking the Court to engage itself in a matter that could only endanger respect for the Court as a judicial body.

Each of the foregoing grounds, as well as the additional grounds discussed in the United States Counter-Memorial, is in and of itself sufficient to warrant dismissal of the Nicaraguan Application. It should be emphasized that none of these grounds is dependent on factual determinations to be made at a merits stage and all are presented on the face of the Nicaraguan Application.

In a broader sense this Court should remember that the issue is one of strengthening the rule of law among nations and this Court as an indispensable part of that rule of law. The rule of law, however, is more than simply the availability of third-party dispute settlement mechanisms. It is also the actions of nations in upholding their Charter and regional obligations on non-use of force and protection of human rights, and their willingness to take collective action to uphold the Charter. It is, as well, the actions of nations and institutions in upholding that allocation of organic responsibilities provided by international law. And it is a commitment to effective and scrupulously fair judicial process in which decisions are not taken that conflict with real world hopes for lasting peace, the actions of political organs seized of a search for peace and human rights, the sovereign rights of absent third States, or realistic conditions for fact appraisal and judicial resolution.

In conclusion, Mr. President and Members of the Court, I respectfully submit that for each of four separate and independent reasons rooted in fundamental community policies about the rule of law and the role and integrity of the judicial process, the Application of Nicaragua is, on its face, inadmissible. Thank you for your courtesy and for your further consideration.

Mr. President, with the permission of the Court, I will now defer to the Agent of the United States, who will sum up for the United States.

STATEMENT BY MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President and distinguished Members of the Court: the United States would like to correct for the record an inadvertent misstatement at page 173, *supra*. We know from Judge Hudson's collected papers that at some point he did receive the 1942 letter of Mr. Giraud, which is included as Annex 25 to the United States Counter-Memorial (**II**). Judge Hudson quoted from that letter in his opinion of December 1955, which is Annex 37 to the United States Counter-Memorial (**II**).

In its oral argument these last two days, the United States has demonstrated, for each of five different reasons, that this Court does not have jurisdiction over Nicaragua's claims, and that Nicaragua's Application is inadmissible. The United States has examined each of these arguments and Nicaragua's written and oral responses in detail. The length of the United States oral presentation is attributable to the complexities and inconsistencies of Nicaragua's arguments, to the new written and oral material introduced by Nicaragua in last week's proceedings, and to the need to demonstrate the irrelevance and inaccuracy of the Nicaraguan arguments.

Mr. President and distinguished Members of the Court, you have now heard our oral argument. It is fair to say that the United States has left no stone unturned — and the United States respectfully submits that under every stone is written, in an indelible hand, the same message: "no jurisdiction" and "inadmissible".

The United States, in conclusion, makes the following submission in keeping with Article 60, paragraph 2, of the Rules of Court:

May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in these oral proceedings and in the United States Counter-Memorial of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of the Court and (2) are inadmissible.

Thank you, Mr. President and distinguished Members of the Court for your patience and your attention.

The Court rose at 6.05 p.m.

FOURTEENTH PUBLIC SITTING (17 X 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Court, we have requested a little more of your time in order to reply fundamentally to what we consider to be in effect the first formulation of the United States argument based on the so-called Vandenberg reservation. But for the late hour we would have taken care of this yesterday. Mr. Reichler will address this point and afterwards I will request some more of the Court's time to set the record straight on certain other points. I ask the Court to recognize Mr. Reichler.

ARGUMENT OF MR. REICHLER

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Mr. REICHLER: Mr. President, Members of the Court, may it please the Court. As the Agent of Nicaragua has said, the United States devoted a considerable amount of attention in its oral pleadings to the Vandenberg Amendment. Some new arguments were made that were not included in the United States Counter-Memorial. My purpose this morning is not to repeat what we have already said about the Vandenberg Amendment but to address these new arguments, advanced for the first time in the oral pleadings of the United States.

To begin, Nicaragua contends that the Vandenberg Amendment is superfluous, that it is redundant, because it says no more than what is already contained in Article 36 (2) of the Statute of the Court. It neither adds to nor detracts from the United States declaration of 1946. And in any case it would have application only to Nicaragua's treaty-based claims and not to its claims under general international law.

The Court has already heard the basis for Nicaragua's contention: that the text of the Vandenberg Amendment is confusing, necessitating resort to the *travaux préparatoires*, or legislative history, to determine its proper meaning, and that the *travaux préparatoires* fully demonstrate that the Amendment is redundant and that it was understood precisely as such when it was enacted.

Nicaragua has not heard anything from the United States to create doubt that this is the correct interpretation of the Vandenberg Amendment, and Nicaragua stands by it. But Nicaragua wishes to offer its observations on the United States argument presented on Monday and Tuesday of this week. The United States has argued that the Vandenberg Amendment must mean something, that it is implausible that the drafters intended it to have no meaning whatever, and that consequently it cannot simply be treated as a nullity.

Nicaragua agrees. We do not argue that the Vandenberg Amendment has no meaning, that it was intended to be meaningless or that it should be treated as a nullity. Nicaragua's position is merely that when the meaning of the Vandenberg Amendment is properly understood, which can only be accomplished by studying the legislative history, it turns out to be redundant because its impact is already encompassed within Article 36 (2).

The United States argues that the Court cannot interpret the Vandenberg Amendment in a way that would render it superfluous because that would be contrary to Articles 31 and 32 of the Vienna Convention on the Law of Treaties and the canons of treaty construction reflected therein. The United States position as expressed by Mr. Norton is that the Law of Treaties governs the construction of declarations under Article 36 (2) and that the canons of construction require that all the words of such declarations be given meaning and prevent them from being treated as superfluous. It will not escape the Court's attention that the United States position in this regard, as expressed by Mr. Norton, is contrary to the United States position as expressed by Professor MacDougal. Professor MacDougal, the Court will recall, argued that declarations under Article 36 (2) are not treaties, and are not governed by the Law of Treaties.

Nicaragua's position on the applicability generally of the Law of Treaties to declarations under Article 36 (2) has been discussed by Professor Brownlie and

I will not repeat it here. But it is important for present purposes to point out that declarations under Article 36 (2) differ from treaties in one important respect : declarations are drafted unilaterally ; treaties, whether bilateral or multilateral, are not. Treaties result from a process of negotiation. The specific language chosen is the product of agreement between two or more States. There is reason, therefore, to attribute meaning to each and every phrase.

Declarations do not carry the same presumption. They are drafted unilaterally, and we know that they frequently include provisions that are redundant or superfluous — in deference to national concerns or to an abundance of caution. Thus, in interpreting declarations, the Court does not apply the same canons of construction as it would to a treaty text. In particular, the Court does not shrink from holding a particular provision in a declaration to be superfluous when this is consistent with the intention of the declarant State as reflected in the *travaux preparatoires*.

This, in fact, is the teaching of the Court's Judgment on Preliminary Objections in the *Anglo-Iranian Oil Co.* case. The decision of the Court in that case is directly relevant here. The Court will recall that the construction of the Iranian declaration under Article 36 (2) was at issue. The United Kingdom argued that Iran's interpretation of its own declaration could not be accepted by the Court because such an interpretation would have rendered part of the declaration superfluous. This is what the Court said :

> "The Government of the United Kingdom has further argued that the Declaration would contain some superfluous words if it is interpreted as contended by Iran. It asserts that a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.
>
> It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous." (*I.C.J. Reports 1952*, p. 105.)

The Court reached this determination by examining the intention of the declarant State, as reflected in the *travaux préparatoires* — in that case the actions of the Iranian Majlis, leading up to the ratification of the Declaration. The Court explicitly rejected the contention of the United Kingdom that it could not examine the actions of the Iranian legislature to determine the intention behind the declaration. The Court said that such legislative actions could be taken into consideration for the purpose of "throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration" (*ibid.*, p. 107).

Likewise, Nicaragua has examined the legislative history of the Vandenberg Amendment to throw light on the intention of the United States Senate at the time it enacted the Amendment. I will not repeat that examination of the Senate's intention. But it is appropriate to remind the Court of Senator Vandenberg's own words with which he explained his Amendment in the floor debate with Senator Thomas. Senator Vandenberg said, after reading into the record the text of his Amendment : "As I understand the Senator from Utah, he agrees with me that the situation defined in this suggested reservation is the situation which would exist without the reservation." And Senator Thomas replied : "That is true." (Nicaragua's Exhibit F, p. 317, *infra*).

Last Tuesday, when I first read these words in this Court, I pointed out that the United States Counter-Memorial completely omitted them, and completely omitted any reference to the floor debate in the Senate on the Vandenberg Amendment. I said, at that time, that Senator Vandenberg's words and the floor debate were conspicuous by their absence from the United States Counter-Memorial.

I waited for Mr. Norton to discuss Senator Vandenberg's comments, curious to hear how he would attempt to explain them. I waited in vain. He made no mention of Senator Vandenberg's comments and made no reference at all to the Senate floor debate. How much more conspicuous these omissions are now!

It should not be regarded as unusual that the declaration of the United States under Article 36 (2) includes a reservation that is, and was understood to be, superfluous. In fact, it is quite common for States to include such surplusage in their declarations. Fourteen States have adopted reservations excluding from their acceptance of compulsory jurisdiction disputes relating to matters which, under international law, are essentially within the domestic jurisdiction of the declarant State. These reservations (14 of them) are totally superfluous. They are pure surplusage.

The *Yearbook* includes 12 declarations that specify the types of disputes to which they apply. These declarations repeat verbatim the list of disputes set forth at subparagraphs *(a)* through *(d)* of Article 36 (2). Again, totally superfluous.

Yesterday, we heard Professor Moore, of the United States team, make the same point. He said that a number of States have reservations to their declarations that are complete redundancies (pp. 269-270, *supra*). He said that this is not unusual and that it results from "an abundance of caution". He might have chosen the words "additional safeguards", the words used by the drafters of the Vandenberg Amendment. In any event, it should cause no surprise, least of all to counsel for the United States, that the Vandenberg Amendment is another example of a superfluous reservation, enacted from "an abundance of caution".

The United States contends that there are five other States with reservations the same as or similar to the Vandenberg Amendment, and if the Court determines that the Vandenberg Amendment is superfluous, it will in effect, be making the same determination with regard to the reservations of five other States. Neither contention is correct.

In fact, three of the States — India, El Salvador and the Philippines — have reservations that clearly and expressly preclude jurisdiction in disputes arising under multilateral treaties unless all of the parties to the treaty are before the Court. They are quite different from the United States reservation. The Court's interpretation of the Vandenberg Amendment in this case could have no bearing on those three States.

Only Pakistan and Malta have reservations similar to the Vandenberg Amendment. Even their reservations would not necessarily be affected by an interpretation of the Vandenberg Amendment. The meaning of an ambiguous reservation can only be determined by reference to the intention of the declarant State. The meaning of Pakistan's or Malta's reservation may or may not be the same as the Vandenberg Amendment. It depends on the intention of Pakistan or Malta. Conversely, Pakistan's interpretation of its own reservation in the case of the *Pakistani Prisoners of War*, cited by counsel for the United States, does not bear on the proper interpretation of the Vandenberg Amendment.

The United States argues that Nicaragua is wrong to look at the legislative history, that the process of interpreting the Amendment begins and ends with the text, and that there is a plain meaning apparent from the text.

Let us examine this argument.

The United States says the plain meaning of the Amendment is that it applies to claims arising under a multilateral treaty where there are absent States (parties to the treaty) that would be "affected by the decision" of the Court. Fair enough.

But how does the United States determine when a State is to be deemed "affected by the decision"? Not from the text of the Amendment. All of a sudden the "plain meaning" is not so plain. Not in the least. The text gives no hint as to what is meant by the words "affected by the decision". What the United States does at this point is abandon the text and look to the "underlying rationale" of the Amendment. The "underlying rationale".

In other words, they do the same thing they criticize Nicaragua for doing. When they conclude that the text is confusing or ambiguous, they impute meaning to the Amendment by looking to the intention of those who enacted it. We don't criticize the United States for doing this. The confusing text of the Amendment requires it. But the United States should not pretend that its interpretation is based on the "plain meaning" of the text. It is not. It cannot be. The meaning is not plain.

There is one enormous difference between the United States attempt to ascertain the "underlying rationale" of, or intention behind, the Vandenberg Amendment and Nicaragua's. Nicaragua's interpretation is based on and fully supported by the *travaux préparatoires*, the legislative history. The United States interpretation is not. I discussed that history in detail and showed how it supported Nicaragua's interpretation last Tuesday. By contrast, counsel for the United States, the Court will recall, barely mentioned the legislative history and completely ignored the floor debate in the Senate.

There is a reason for this studied omission.

The United States so-called "underlying rationale" for the Vandenberg Amendment is in fact made up out of thin air. It finds no support whatsoever in the *travaux préparatoires*. Moreover, even if the United States "underlying rationale" truly reflected the intention behind the Vandenberg Amendment — that is, even if the United States interpretation of the Amendment were correct — the Amendment, so interpreted, still would not deprive the Court of jurisdiction over any of Nicaragua's claims.

The United States says that an "underlying rationale" of the Vandenberg Amendment is to protect the United States from the prejudice that might result if a suit is brought against it as a result of a multiparty dispute, when all the parties to the dispute are not before the Court. Let us take this at face value and examine it closely.

In what circumstances could the United States be prejudiced if it is sued by one, but not all, of the parties to a multilateral dispute?

There is only one circumstance. No other is even conceivable. That would occur where several States, parties to the treaty, had potential claims against the United States as a result of the same or a similar treaty violation by the United States. The United States could conceivably be prejudiced if the other States brought suit *seriatim*.

In such circumstances the United States clearly would want to defend against all the claims in a single suit. If not, and the United States lost the first case, the other claimants, or potential claimants, would attempt to obtain the benefits. If the United States won, however, the other claimants would not be bound by the judgment. If the Vandenberg Amendment were intended to protect the United States from prejudice as a result of litigation in the absence of all interested parties, then this is the precise — and, indeed, the only conceivable — prejudice it was intended to prevent. That is, where the absent parties have interests *adverse* to the United States, and where their claims are the same as or similar to the State suing the United States.

The document submitted to the Court on Monday as United States Supplementary Annex 20 confirms that, if anything, the Vandenberg Amendment was understood as protecting the United States from suits in multiparty disputes where there were absent parties adverse to the United States. That document is a memorandum written by an attorney in the State Department Legal Adviser's Office in December 1946. It discusses a proposal by New Zealand that the trusteeship agreement relating to the United States administration over territories formerly mandated to Japan should include a clause vesting this Court with jurisdiction over all disputes arising under the agreement. The writer of the memorandum recommended that if the jurisdictional clause were included in the proposed treaty, it should be subject to the same reservations on the part of the United States as the United States Declaration under Article 36 (2), including specifically the Vandenberg Amendment. The writer said that this would result in "the requirement that all parties affected by the decision must also be parties to the case before the Court".

The only purpose served by the Amendment in that context would have been to prevent the United States from being sued for breach of its obligations under the agreement unless all States asserting that breach, or seeking redress for that breach by the United States, were parties to the suit. It would have protected the United States against separate suits by adverse parties with the same or similar claims.

That, of course, is not this case. The absent States do not have interests adverse to the United States. They do not have claims or potential claims against the United States, let alone claims that are similar to those of Nicaragua. There is therefore no possibility that the United States could be prejudiced by an adjudication in their absence. Nor have counsel for the United States given any evidence or made any credible argument that the United States would indeed be prejudiced by an adjudication in the absence of any other State.

Thus, even if we accept, for the sake of argument, the United States interpretation of the Vandenberg Amendment and impute to the Amendment the "underlying rationale" hypothesized by the United States, the Amendment still does not deprive the Court of jurisdiction in this case.

There is, to come to the final point of my presentation this morning, one further "underlying rationale" that the United States imputes to the Vandenberg Amendment. The United States says that, in part, the Vandenberg Amendment was intended to protect absent States — that is, States other than the United States — from the prejudice that could result from an adjudication in their absence. This is an untenable proposition. There is certainly nothing in either the text or the *travaux préparatoires* to suggest such an intention on the part of anyone connected with the conceiving, drafting or enacting of this Amendment.

The United States cites nothing in support of this proposition. There is nothing that supports it. Nor is there any reason to presume — in the total absence of factual or historical support — that the United States would have had such an intention. One can examine the declarations listed in the Court's *Yearbook* a long time before coming to one containing a reservation that was intended to protect a State other than the declarant State. It was not and is not the practice of States to do so. There is no reason to presume that the United States, alone, was preoccupied by a desire to protect the rights of unknown third States in unforeseeable future cases.

But, once again, for the sake of argument, let us suppose that the meaning the United States has imputed to the Vandenberg Amendment is correct. Let us suppose, for the moment, that the Amendment was intended to protect third States from prejudice to their interests by an adjudication in their absence. Even under such a strained and implausible interpretation of the Vandenberg Amendment, it still would not deprive the Court of jurisdiction over any of Nicaragua's claims in this case.

In arguing earlier this week that a decision by the Court in this case would "affect" Honduras, Costa Rica and El Salvador, the United States for the most part repeated the arguments in its Counter-Memorial. We responded to these arguments in our oral presentation last Tuesday, and see no need to do so again. Let it suffice to reiterate that Nicaragua does not allege that the United States is engaged in "concerted action" with any other State. Nicaragua claims that the United States is fully responsible for the illegal use of force described in its Application. Nicaragua directs its claims solely against the United States and Nicaragua seeks relief only from the United States. The Application does not call upon the Court to adjudicate the legal rights or responsibilities of any State other than Nicaragua and the United States. I refer to oral arguments of Tuesday afternoon, 9 October (pp. 85-86, *supra*).

The United States did make one new point this week, however, which of course we did not address last Tuesday. According to the United States:

> "Nicaragua's Central American neighbours have also advised the Court of their specific concern that adjudication of Nicaragua's claims in this tribunal would affect their interests by undermining the Contadora negotiations now under way." (P. 201, *supra*.)

The communications these States have sent to the Court fail to establish that they would be affected by a decision of the Court, even under the United States interpretation of the Vandenberg Amendment.

In the first place, the Vandenberg Amendment is included in a legal text. It is the Court's duty to determine if the interest supposedly affected is well founded in law. In fact, the so-called interest of these States that would be affected, if any, is not a legal right or other cognizable legal interest. None of the States has a right to compel Nicaragua to forego judicial resolution of its claims in favour of any other forum. Thus, the three States would not be affected in any legal sense by an adjudication of Nicaragua's claims.

Second, at least in the case of Costa Rica and Honduras, the communications from these States do not ask the Court to refrain from adjudication of this case. Costa Rica and Honduras communicated with the Court only at the interim measures phase and only to ask that the Court not issue an order that would undermine the Contadora process. Costa Rica and Honduras have made no contact with the Court during the present preliminary objections phase, and there is no reason to presume that they see any threat to the Contadora process or their interests by an adjudication of this case. Nor would such a view be supportable. As Nicaragua has already shown, the Contadora process has achieved its most positive results since the Court's Order of 10 May. Adjudication of this case has not, in fact, had any adverse effect on the Contadora process, nor is it likely to have any adverse effects in the future.

Third, the mere fact that absent States may argue that they would be adversely affected by a decision of the Court — even if that were the situation here — would not be binding on this Court. The Vandenberg Amendment has no self-judging clause. Still less does it make the absent States judges as to whether and how their own interests would be affected. If it were otherwise, jurisdiction in any suit against — or even by — the United States under a multilateral treaty could be frustrated merely by inducing an absent State party to the treaty to claim that its interests would be adversely affected by a decision.

In the final analysis, the United States argument that absent States would be affected by a decision in this case reduces itself to the contention that the actions of the United States charged in Nicaragua's Application are being conducted pursuant to the supposed right of collective self-defence of El Salvador, and that any decision by the Court on the lawfulness of the United States conduct would affect El Salvador's right of self-defence. We have already pointed out that the mining of Nicaragua's ports and the carrying out of military and paramilitary activities in and against Nicaragua for the purpose of overthrowing the Nicaraguan Government cannot, under any circumstances, constitute legitimate self-defence. El Salvador has no right to engage in such conduct, or to have the United States do so on its behalf, and accordingly, no legitimate interest of El Salvador could be affected by a decision in this case that would cause the United States to terminate its unlawful activities.

Furthermore, as the United States itself recognizes, the right of self-defence, whether collective or individual, does not come into existence unless and until there is an "armed attack". Thus, neither El Salvador nor any other State has a right of self-defence against Nicaragua, let alone one that would be affected by a decision in this case, unless it is first established that Nicaragua is engaged in an "armed attack" against it.

Yet the United States would have the Court terminate the proceedings now, before any "armed attack" by Nicaragua has been proven or even properly alleged. Nicaragua should not be denied access to this Court on the basis of nothing more than the generalized and self-serving allegations of the Counter-Memorial, or the rhetoric of counsel, unsupported by any evidence.

The Court simply cannot determine at this phase of the proceedings — on the present record — that its decision on the merits would affect the right of self-defence of any other Central American State.

Such a determination would depend, as we said at paragraphs 265 and 266 of our Memorial (**I**), on pleadings, supported by proof, that Nicaragua is engaged in an armed attack within the meaning of Article 51 of the Charter against one or more of its neighbours. No such pleading or proof is now before the Court, and indeed it cannot be until the merits phase of this case.

In conclusion, Mr. President and Members of the Court, the Vandenberg Amendment interposes no bar to the jurisdiction of the Court in this case. As is clear from the legislative history, it was invented out of an abundance of caution as an additional safeguard and was not intended to change the meaning of the United States declaration as it stood without the Amendment. Even accepting the United States assertion to the contrary, and even accepting *arguendo* the interpretation of the Amendment advocated here by the United States, the Court cannot find, on the record before it, that any absent State would be "affected by the decision" within the meaning of the Vandenberg Amendment.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Court.

All the issues in this case have been amply formulated. There is probably nothing to add that would be new for the Court and hence justify taking more of your time. But before concluding, there are some points on which I wish to set the record straight.

The United States has accused Nicaragua of coming before this Court with misrepresentations in

> "an unprecedented abuse of the Court by a party seeking the Court's assistance, and . . . totally contrary to general principles of international law, and particularly to any conception of due process" (p. 153, *supra*).

This is, I might say, typical of the kind of exaggerated language the United States has used throughout this proceeding.

This alleged abuse is said to consist in the representations Nicaragua made in the first phase of this case to the effect that Nicaragua ratified in due course the Protocol of Signature of the Permanent Court of International Justice. This is contrasted with later statements made by Nicaragua in its Memorial to the effect that Nicaragua has never completed ratification of the old Protocol of Signature (pp. 152 ff., *supra*).

Mr. President, Members of the Court, a simple perusal of the proceedings on interim measures of protection will demonstrate that Nicaragua has not made any misrepresentations to this Court. The representations Nicaragua made as to ratification of the Statute referred very clearly to the internal process of ratification that the United States affirmed had not been completed by Nicaragua. I refer the Court to the public sitting held at 4 p.m. on 27 April 1984. In the first paragraphs of my address at that time to this Court the matter of ratification is clearly explained. I said at that time:

> "When the Statute of the Court became a law of Nicaragua, this fact was notified to the Secretary of the League of Nations. It was the year 1939: the start of the Second World War. There are quite obvious reasons why this ratification may never have reached Geneva at that time, but, in any case, this has no bearing on Nicaragua's acceptance." (**I**, p. 119.)

I cannot see how the United States could have misunderstood what I believe every Member of this Court understood very clearly.

The fact that Judge Schwebel in his separate opinion of 10 May expressed views on the applicability of Article 36 (5) of the Statute — what the United States has baptized as the "Memorial theory" — certainly proves that this Court was not misled as to Nicaragua's having deposited the ratification.

The United States said that in the 45 years since the telegram of November 1939, no Nicaraguan official has publicly asserted that Nicaragua was bound to this Court.

Frankly, the important thing, it seems to me, is that after the listing of Nicaragua as bound made by this Court in United Nations publications, publications of other States, publications of eminent jurists, Nicaragua has never denied being bound.

This "silence" on Nicaragua's part includes the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* in which Nicaragua was summoned as a respondent to an Application asserting jurisdiction in part based on Article 36 (2). It is not conceivable that a State which did not consider itself bound would have let that assertion pass without objection. And I would add, Mr. President, it is not conceivable that the Court, faced with the public and scholarly record of so many years, would have permitted Nicaragua, as a respondent, to escape jurisdiction if it had tried to do so on the basis of the footnote we have spent so much time discussing in these proceedings.

The United States has talked a good deal in these proceedings about the three fundamental principles governing the jurisdiction of the Court: consent, equality and reciprocity. Nicaragua's position is based precisely on these principles.

As to consent — both Parties have consented to the jurisdiction of the Court by effective declarations — Nicaragua, by virtue of Article 36 (5); the United States under Article 36 (2) of the Statute. The United States should be held to the consent it gave. The Senate Report approving the United States declaration in 1946 said: "The provision for six months' notice of termination . . . has the effect of a renunciation of any intention to withdraw our obligations in the face of a threatened legal proceeding." This is an exhibit in our Memorial, Annex II, (Exhibit D, I, p. 442 (p. 315)). By well-known principles endorsed by the Court in the *Anglo-Iranian Oil Co.* case, that statement establishes the meaning of the declaration. The United States should not be permitted to change that meaning now.

As to equality, Nicaragua brings its case to this Court precisely because it is the one forum in which both Parties to the dispute appear as true equals. The United States must not be permitted to force the dispute into forums where its superior power and influence will determine the outcome.

As to reciprocity, Nicaragua asks nothing more than the application of that principle in its true meaning. Nicaragua accepted the jurisdiction of this Court unconditionally and without limit of time. It exposed itself to the risks of litigation on those terms. The United States must not be permitted to deprive it of the benefit of that exposure by a strained and novel theory of reciprocity.

In the first statement to the Court in this phase of the case, the Agent of the United States said:

> "International adjudication before this Court can only be an efficacious means of peaceful dispute resolution if States respect the authority of the Court. They will do so only if they can expect the determination of their rights in accordance with the law." (P. 151, *supra*.)

On the same theme, the Agent of the United States said that adjudication of this case by the Court would be "of grave significance not only for the situation in Central America but also for the continued effectiveness of the compulsory jurisdiction of the Court under the Optional Clause" (p. 150, *supra*).

I may be sensitive, Mr. President, but to me these words have a certain threatening tone. I have never before heard it suggested that the Court does not decide cases before it according to law.

Mr. President, Members of the Court. We have sat here for eight sessions listening to detailed technical arguments and scholarly analysis on the questions of the Court's jurisdiction and the admissibility of this case. These arguments, in all their intricate detail, are both necessary and proper, because the Court in deciding the case must have the benefit of the fullest possible illumination of these issues.

However, concentration on these details should not be permitted to obscure the larger dimensions of the question before you for decision.

For four years the United States has been sponsoring, financing, organizing and directing a campaign of armed action against Nicaragua. That much is admitted out of its own mouth — in official documents, reports, and speeches spread on the record in Washington and elsewhere.

For the same four years the United States has exerted all its efforts, exercised all its power, to ensure that its actions would not be subject to outside review in any forum.

In this proceeding, the United States has said that the proper forum for Nicaragua is the Security Council. When Nicaragua went to the Security Council, the United States cast the only negative vote against a resolution to redress the situation.

The United States vetoed Security Council action.

The United States has said that Contadora is the appropriate forum for these issues. Nicaragua has participated faithfully and actively in the Contadora process, and will continue to do so. But let there be no mistake, Mr. President. The four Contadora powers produced an Acta and offered it for signature by the Central American countries. At first, it appeared that Nicaragua's neighbours would all sign the Acta. They had, after all, been fully involved in negotiating it and had raised no objections to the text. Then Nicaragua announced officially that it would sign. The United States — which had been sanctimoniously proclaiming its support of Contadora — immediately denounced Nicaragua's action as some kind of a trick and put pressure on Nicaragua's neighbours not to sign.

The United States vetoed Contadora.

Mr. President, this Court is the final forum to which Nicaragua can appeal for impartial judgment of its claims, according to law and justice. We have heard much from the lawyers for the United States about the rule of law. The first principle of the rule of law is that a party should not be judge in its own cause. We have shown in great detail that both Nicaragua and the United States have submitted to the jurisdiction of the Court and that the objections to admissibility are without substance. The United States now says, however, that this Court of Justice is not the appropriate forum to hear Nicaragua's claims.

Mr. President, Members of the Court. They must not be allowed to veto the International Court of Justice.

In accordance with Article 65, paragraph 2, of the Rules of Court, I have the honour to communicate the following final submissions on behalf of the Government of Nicaragua.

Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984, and also the arguments advanced in the oral hearings on behalf of Nicaragua, the Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua, filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety.

With these short statements Nicaragua closes its presentation and thanks you, Mr. President and Members of the Court, for your patience.

The Court rose at 10.50 a.m.

FIFTEENTH PUBLIC SITTING (18 X 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

STATEMENT BY MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Members of the Court, may it please the Court.

The United States this morning will briefly address certain of the points raised by Nicaragua during yesterday's session. The United States Agent will make several preliminary comments. Then, with the Court's permission, Deputy-Agent Norton will respond to Nicaragua's arguments of yesterday, concerning the Multilateral Treaty Reservation to the United States 1946 declaration accepting the compulsory jurisdiction of this Court. The Agent will then conclude the United States presentation.

Our preliminary comments concern first, the Contadora process, second, the procedural basis for these proceedings, and third, Nicaragua's failure to accept the compulsory jurisdiction of this Court.

First, as regards Contadora, the United States has already explained the incompatibility of the adjudication of Nicaragua's claims with that process. We return to the issue only because of statements made yesterday by Nicaragua.

The Contadora process has not been "vetoed". Contadora remains very much alive, despite the attempt by Nicaragua to "freeze" the process by demanding that the other Contadora participants accept the 7 September draft Acta "as is". All of those other participants have stated publicly that the draft Acta, though it is laudable progress, requires further work. The United States would, for example, invite the Court's attention to Mexican Foreign Minister Sepulveda's widely reported statement of 12 October 1984 in this regard. The four Contadora States and Nicaragua's four Central American neighbours are unanimous in their recognition of the need for further improvement in the draft Acta. The United States notes that this very morning's *International Herald Tribune* reports that Nicaragua has refused to attend a meeting of Central American foreign ministers to discuss the Contadora regional peace treaty. In short, it is Nicaragua, Mr. President, that is the principal obstacle to peace in the region.

Second, as regards the procedural status of this phase of the case, it is necessary to recall that the basis of the present proceedings are the Orders of the Court of 10 and 14 May 1984. As the United States has previously emphasized, it is for Nicaragua to establish that this Court has jurisdiction and that the Nicaraguan Application is admissible. We submit that Nicaragua has beyond any doubt not discharged its duty of satisfying this Court with respect to either question.

Furthermore, the United States would note that the issues of jurisdiction and admissibility are ready for decision. Contrary to the suggestion made yesterday by counsel for Nicaragua, no further facts or proceedings are required for the Court to dispose of these issues.

Third, the United States believes that its presentation earlier this week, concerning Nicaragua's failure to accept the compulsory jurisdiction of this Court, effectively rebutted each of the arguments advanced by Nicaragua on this issue in its written and oral pleadings, including those of yesterday. The United States is content to let the documents and transcripts before the Court speak for themselves.

Mr. President, to sum up this pivotal issue, the record now shows that Nicaragua never accepted the compulsory jurisdiction of the Permanent Court, that Article 36 (5) of this Court's Statute does not apply to States that never bound themselves to accept that jurisdiction of the Permanent Court, and that Nicaragua has never deposited a declaration under Article 36 (4) of this Court's Statute, despite the advice of Professor Rousseau to do so.

The United States submits in conclusion that Nicaragua has beyond any doubt failed to satisfy its burden of persuasion that it has accepted the compulsory jurisdiction of this Court. Indeed, the United States has proven the contrary. This result is a fundamental plea in bar that, as we have argued from the outset of this case, in and of itself, requires the dismissal of this case.

Mr. President, the United States would respectfully ask that you call upon Deputy-Agent Norton to address the Court with regard to the United States multilateral treaty reservation.

ARGUMENT OF MR. NORTON

DEPUTY-AGENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. NORTON: Mr. President, distinguished Members of the Court.

Earlier this week the United States explained that, in accordance with the plain terms of the Multilateral Treaty Reservation to the United States 1946 declaration, Nicaragua's treaty-based claims are barred. The United States further explained that Nicaragua's custom-based claims cannot be heard under these circumstances.

Yesterday, Nicaragua offered further observations on this point. Nicaragua continues to argue that the reservation is a redundancy. Nicaragua also contends that there are, in any event, no other States that would be "affected by" any decision that may be rendered in this case. Both of these propositions are wrong.

In its 9 October oral argument, Nicaragua, based on highly selective citations from the limited legislative history, concluded that the multilateral treaty reservation:

> "was conceived, intended and enacted to deal with a specific situation — *a multi-party suit against the United States that included parties that had not accepted the Court's compulsory jurisdiction*. Its sole purpose was to enable the United States to avoid adjudication in such a case. It was, of course, superfluous . . ." (P. 93, *supra*; see also pp. 89-91, *supra*; emphasis added.)

Nicaragua's position was thus that the reservation was concerned with "multi-party suits . . . that included parties that had not accepted the Court's compulsory jurisdiction". Nicaragua *specifically denied* that the reservation was concerned with absent parties. I would call the Court's attention in this regard to page 94, *supra*.

As the United States demonstrated on Tuesday (p. 209, *supra*), however, the reservation *by its plain language* is concerned with absent parties and *only* absent parties. The most notable feature of Nicaragua's oral argument yesterday was that Nicaragua made no attempt to reconcile its construction of the reservation with the plain text of the reservation — even after the United States had demonstrated the manifest inconsistency between the two.

Nicaragua's argument yesterday was concerned not with the plain language of the reservation — the starting point for the analysis of any legal document — but with attempts to explain why the Court should ignore that language. Nicaragua does so in order to argue, on the basis of a single fragment of the legislative history, that the reservation means exactly the opposite of what it says.

Nicaragua relies on statements by two United States Senators on the floor of the Senate suggesting that they thought the reservation somehow redundant — exactly why they thought so remains unclear. It is, in fact, impossible to discern from the brief floor debate what Senators Vandenberg and Thomas understood by the reservation. What is clear, however, is that they could not have understood the reservation as Nicaragua argues because, as we have proved and Nicaragua has made no attempt to disprove, Nicaragua's construction simply contradicts the terms of the reservation itself.

More importantly, the brief floor debate is only a part of the legislative history. The reservation was drafted by the State Department, considered by the Senate

Foreign Relations Committee, approved by the full Senate, and incorporated into the United States 1946 declaration by the President. Other participants in this process clearly understood the reservation as a meaningful limitation on the United States consent to this Court's jurisdiction.

Nicaragua agrees that the Multilateral Treaty Reservation had its origin in John Foster Dulles's 1946 Memorandum (II, United States Ann. 106). As the United States explained on Tuesday, Dulles's concerns were directed at *absent* parties and *only absent* parties (pp. 209-210, *supra*). It is, we submit, *impossible to reconcile* Dulles's expressed concerns about absent parties with Nicaragua's interpretation that the reservation is concerned with improper applicant States coming into a case.

Further, the State Department, which again drafted the reservation, understood it at the time as an effective limitation on the United States consent to compulsory jurisdiction, precluding jurisdiction in the absence of certain States. (United States Suppl. Ann. 20, p. 367, *infra*.) All contemporaneous commentators and all subsequent writers agree. No one has *ever* previously argued that the reservation is redundant.

The only possible uncertainty on the face of the reservation is with respect to its breadth, namely whether the presence of *all* parties to a treaty is required or only those parties affected by a decision. Nicaragua takes that one ambiguity as an excuse to look behind the text to the legislative history; then Nicaragua takes a small, admittedly confused, portion of the legislative history *unrelated to the ambiguity in the text* and proposes a wholly different interpretation of the text — an interpretation, moreover, directly at odds with the text. Mr. President, this is not using *travaux préparatoires* to illumine an obscure text. It is a manipulation of the *travaux* to contradict the text and deny it effect.

Three more very brief points should be made in this regard. First, contrary to the statement yesterday by counsel for Nicaragua, the United States has never contended here that declarations under the Optional Clause are governed by the law of treaties. We invite the Court's attention to the statement to the contrary at page 206, *supra*.

Second, it is, of course, true that a reservation *can be* redundant. But the presumption, under standard canons of interpretation, is that it is not. Domestic jurisdiction reservations, armed conflict reservations, and the recitations of the categories of dispute in Article 36 (2) — these are the examples cited by Nicaragua — all merely repeat matters already covered in the Charter or in the Statute. It is quite another matter to take a reservation meaningful on its face and to impute to it a directly contradictory and redundant meaning based solely on isolated quotations from the legislative history.

The Court's decision in *Anglo-Iranian Oil Co.* is not to the contrary. There, the Court found a few words in Iran's reservation redundant to the rest of the reservation. The Court most certainly did not ignore the plain meaning of the text, much less go to Majlis debates to find support for a construction contradictory to that plain meaning.

Third, it is disingenuous for Nicaragua to suggest that other States with multilateral treaty reservations would not be affected by this Court's construction of the United States reservation. Should the reservations of the other States come before the Court, the first source to illumine their meaning will be the Court's ruling here.

Further, as Nicaragua cannot and does not attempt to deny, Pakistan and India understood the identical Pakistani reservation not as a redundancy but as a meaningful limitation on Pakistan's consent to jurisdiction. They differed only as to whether Pakistan's reservation should be construed narrowly or broadly.

Under either construction, of course, Nicaragua's case would have to be dismissed.

Having failed to sustain its contention that the Multilateral Treaty Reservation is a mere redundancy, Nicaragua yesterday urged a new construction of the reservation. Nicaragua now urges that the reservation requires only that *all adverse parties* must be before the Court (pp. 277-278, *supra*). The short answer is that this is *not* what the reservation says. The terms of the reservation provide that *all parties* that would be affected by a decision of the Court must be before the Court.

Parenthetically, we would note that Nicaragua has cited United States Supplemental Annex 20 in support of its new theory. Why that Annex is cited is less clear. As we have argued, that document constitutes a contemporaneous State Department understanding that is consistent with our present argument and offers no support to Nicaragua's theories, old or new.

The remainder of Nicaragua's contentions yesterday assumed, *arguendo*, that the reservation does mean what its plain text says — that there is no jurisdiction unless all treaty parties "affected by" a decision of the Court are also before the Court. Nicaragua adduced several arguments intended to demonstrate that no other States would, in fact, be affected by the Court's decision here.

For these purposes, one must take Nicaragua's pleadings as stated and assume that the relief sought will be granted. No other approach would be consistent with the reservation's terms, which refer to parties "affected by the decision".

The relevant circumstances can be briefly stated. All of the actions alleged by Nicaragua as the basis for its claims are specifically alleged to be taking place in Central America, many of them in the territory of third States. As we have recited at length, and will not repeat again here, Nicaragua's pleadings specifically allege that many of these activities are occurring with the approval of, or in concert with, other Governments. These Governments — particularly Honduras and Costa Rica — and others, notably El Salvador, have stated that the case involves aspects of a multiparty dispute to which they are parties; that it may affect on-going negotiations; that it implicates their legal rights; that, in short, they will be affected by any decision of this Court.

Nicaragua, nevertheless, attempts to argue that the other Central American States will not be affected by a decision in this case. Its allegations in this regard are either demonstrably untrue or irrelevant.

Nicaragua attempts, for example, to deny that it alleges that Honduras and Costa Rica are acting in concert with the United States (p. 279, *supra*). Mr. President, the United States respectfully requests that the Court read the Nicaraguan pleadings that we have cited. There is no ambiguity in those pleadings. Honduras and Costa Rica are repeatedly named, and Nicaragua repeatedly alleges that they are acting with the United States in committing allegedly unlawful acts.

Moreover, within the first few minutes of these oral proceedings, Nicaragua's Agent again alleged the complicity of Central American States in the United States actions, specifically charging that the United States has "the armies of El Salvador and Honduras at its service . . ." (p. 11, *supra*).

Nicaragua also attempts to make light of the statements of its neighbours. Nicaragua alleges, page 279, *supra*, for example, that Costa Rica and Honduras expressed concern only about the provisional measures phase of the proceedings. But that allegation is untrue. Again, we ask only that the Court read the documents, specifically the United States Annexes 102 and 104 (**II**). Nicaragua also notes that Honduras and Costa Rica last communicated to the Court in April and insinuates that they are no longer interested. Mr. President, how many times, and with how much specificity, must the other Central American States express their views that they *will be affected* by a decision in this case? Nicaragua may, for obvious reasons, wish to turn a deaf ear to their pleas. A court of law cannot do so.

Nicaragua also attempts to suggest that the other Central American States do not have "a legal right or other cognizable interest" in the pending case (p. 279, *supra*). What exactly this means, they do not say. We would note that El Salvador has quite specifically indicated that it does have a legal interest here. The implication, in any event, appears to be that without such a legal right, the other States will not be "affected by" such a decision of the Court.

But the Multilateral Treaty Reservation does not speak of a "legal right", nor even, like Article 62 of the Statute, of an interest of a "legal nature". It speaks only of States "affected by" a decision, and thus contemplates a broader, both legal and practical, interest. In light of Nicaragua's own pleadings and the statements of the other Central American States in this regard, the United States fails to see how Nicaragua can maintain that the other States will not be affected.

Finally, Nicaragua attempts to argue that the applicability of the multilateral treaty reservation to Nicaragua's Application must await a determination of the merits that Nicaragua is engaged in an "armed attack" on its neighbours. This is untrue for at least two reasons.

First, Nicaragua has *itself* ensured that any decision of the Court will affect Honduras and Costa Rica by naming those States in its pleadings and again in oral argument last week. Nicaragua has alleged that these States are acting in complicity with the United States. And Nicaragua has demanded that the United States be ordered to "cease and desist" from further assistance to those States. That is the state of the pleadings *now*. For determining as a jurisdictional matter, whether under the terms of the Multilateral Treaty Reservation, the other Central American States would be affected by a decision, the Court must take Nicaragua's claims as Nicaragua has alleged them.

Second, the principal concern of the other Central American States is that any relief in this case, indeed even the *prospect* for relief, can disturb the negotiating balance of the Contadora process. They have explained this seemingly self-evident concern in their communications to the Court. We have explained it as well. Only Nicaragua pretends not to understand.

In conclusion, Mr. President, other States *will* be affected by any decision of the Court in this case. Under these circumstances, the plain language of the Multilateral Treaty Reservation bars Nicaragua's treaty-based claims. And, for all the reasons we previously stated, the reservation must also have the effect of barring Nicaragua's Application in its entirety.

I would ask you to recognize the Agent of the United States.

STATEMENT BY MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. **ROBINSON**: Mr. President, distinguished Members of the Court, the United States would emphasize in concluding its oral argument, as it emphasized in opening that argument, that this case presents the Court at this phase with a number of issues of unprecedented gravity and significance. In this connection, the United States hereby reaffirms all of the arguments that it has made before the Court in both its written and oral pleadings on the issues of jurisdiction and admissibility. The United States cannot fail but note that Nicaragua, in its presentations before the Court, has left unanswered the great bulk of the United States legal argumentation.

Mr. President, distinguished Members of the Court, Nicaragua is asking this Court to base its decision on jurisdiction and admissibility, not on the law but on essentially political considerations, including Nicaragua's assertion that it is small and weak and the United States large and powerful. Nicaragua's request would have this Court violate the most fundamental tenet of modern international law: the equality of sovereign States before the law. That tenet respects the rights of the weak as well as the powerful, the small as well as the large. Indeed, the States best served by a rigorous adherence to the principle of equality as well as to the rule of law in general are the small and the weak. Any departure from those principles ultimately adversely affects them the most.

"Small" and "weak", moreover, Mr. President, are relative terms. By the standards of today's Central America, Nicaragua is neither. Its armed forces are enormously greater than those of its neighbours. It is Costa Rica, El Salvador, Guatemala and Honduras that, in comparison, are small and weak. And, as we have shown, these other Central American States are of the unanimous view that this Court is not the proper forum to address Central America's complex political, social, economic and security problems in one bilateral, isolated context.

In conclusion, Mr. President, distinguished Members of the Court, the United States respectfully submits that if this Court were to do as Nicaragua asks, the Court would not be applying the law. The protections that the law affords to all States, great and small, would be eroded. States must be able to continue to regard this Court as a forum in which they will obtain justice, impartially dispensed in accordance with law.

Mr. President, it is the honour of the Agent of the United States to state the final submissions of the United States as required by Article 60, paragraph 2, of the Rules of Court.

May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Counter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of the Court and (2) are inadmissible.

Thank you, Mr. President, distinguished Members of the Court, for your continued patience and attention.

The **PRESIDENT**: We can now assume that the oral hearings are over. The Court is adjourned.

The Court rose at 10.35 a.m.

SIXTEENTH PUBLIC SITTING (26 XI 84, 10 a.m.)

Present: [See sitting of 8 X 84.]

READING OF THE JUDGMENT

The **PRESIDENT**: The Court meets today to deliver in open court, in accordance with Article 58 of the Statute of the Court, its Judgment on jurisdiction of the Court and admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

The opening paragraphs of the Judgment, dealing with the procedural history of the case, will, as is customary, not be read out.

[The President reads paragraphs 11 to 113 of the Judgment[1].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[Le Greffier lit le dispositif en français[2].]

Judges Nagendra Singh, Ruda, Mosler, Oda, Ago and Sir Robert Jennings append separate opinions to the Judgment; Judge Schwebel appends a dissenting opinion.

In accordance with practice, the Judgment has been read today from a duplicated copy of the text, a limited stock of which will be availabe to the public and the press. The usual printed text of the Judgment will be available in a few weeks' time.

I declare the present sitting closed.

(*Signed*) Taslim O. ELIAS,
President.

(*Signed*) Santiago TORRES BERNARDEZ,
Registrar.

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[1] *I.C.J. Reports 1984*, pp. 397-443.
[2] *C.I.J. Recueil 1984*, p. 442-443.

EXHIBITS AND DOCUMENTS SUBMITTED BY NICARAGUA AND THE UNITED STATES OF AMERICA IN CONNECTION WITH THE ORAL PROCEDURE ON JURISDICTION AND ADMISSIBILITY

DOCUMENTS DÉPOSÉS PAR LE NICARAGUA ET LES ÉTATS-UNIS D'AMÉRIQUE AUX FINS DE LA PROCÉDURE ORALE RELATIVE À LA COMPÉTENCE ET À LA RECEVABILITÉ

EXHIBITS SUBMITTED BY NICARAGUA IN CONNECTION WITH THE ORAL PROCEDURE ON QUESTIONS OF JURISDICTION AND ADMISSIBILITY

Exhibit A

REPORTS OF NICARAGUA'S ACCEPTANCE OF CONTADORA TREATY AND THE UNITED STATES REACTION

1. "NICARAGUANS SAY THEY WOULD SIGN PROPOSED TREATY", *NEW YORK TIMES*, 23 SEPTEMBER 1984
2. "US OFFICIAL DISCOUNTS PLEDGE BY NICARAGUA", *NEW YORK TIMES*, 24 SEPTEMBER 1984
3. "US URGES ALLIES TO REJECT CONTADORA PLAN", *WASHINGTON POST*, 30 SEPTEMBER 1984
4. "W. EUROPEANS TO AID CENTRAL AMERICANS", *WASHINGTON POST*, 30 SEPTEMBER 1984
5. "LATIN PEACE PLAN: WHY THE US BALKS", *NEW YORK TIMES*, 3 OCTOBER 1984
6. "US VERSION OF CONTADORA DRAFT DISPUTED", *WASHINGTON POST*, 3 OCTOBER 1984

[Not reproduced]

Exhibit B

DOCUMENTS FROM THE PAPERS OF MANLEY O. HUDSON, LANGDELL LAW LIBRARY, HARVARD LAW SCHOOL, REGARDING *KING OF SPAIN* CASE

1. LETTER TO ESTEBAN MENDOZA, MINISTER OF FOREIGN RELATIONS, HONDURAS, FROM MANLEY O. HUDSON, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, DATED 12 AUGUST 1955

Law School of Harvard University, Cambridge 38, Massachusetts

August 18, 1955.

Your Excellency:

1. I am confronted with a difficulty in connection with the opinion which I am writing for you on the Honduras-Nicaragua question. Will you please let me explain it to you, and if you can send me anything on it, I believe it might make it possible for us to complete the work.

2. On 24 September 1929, Nicaragua accepted the Article 36, paragraph 2, by making the following declaration:

> On behalf of the Republic of Nicaragua, I recognise as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.
>
> Geneva, September 24, 1929. (*Signed*) T. F. MEDINA.

At this date, Nicaragua had not signed the Protocol of Signature of the Permanent Court of International Justice, and the action of 24 September 1929 was not immediately effective because Nicaragua had not ratified the Protocol of Signature.

3. It did not take this action until on 29 November 1939, when the Nicaraguan Government notified the Secretary-General of the League of Nations by telegraph of Nicaragua's ratification of the Protocol of Signature; the telegram does not seem to have mentioned the acceptance of compulsory jurisdiction, though I am not certain of this. Of course, Nicaragua should have sent a ratification of the Protocol and the Statute of the Court. I can't find that they did so.

4. Nicaragua is still listed as a State which is one of those which has signed the Protocol of compulsory jurisdiction. Sed quaere.

5. I must confess that the problem has interest. A telegraph by Nicaragua would not be a way for them to add to the legal consequences of the action of 1929. So that from September 1929 to the signature of the Charter of the United Nations, I doubt whether Nicaragua did anything to remedy the situation. She certainly was not a signatory.

6. However, on 26 June 1945, Nicaragua signed the Charter of the United Nations, and ratified it on 6 September 1945; it became effective on 24 October 1945. This did not, in any way, affect the compulsory jurisdiction.

7. The problem that worries me is, can Nicaragua be bound by the clause today? Can you send me any documents which would enlighten this action?

Warmly yours,

(*Signed*) Manley O. HUDSON.

2. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA OF 4 JANUARY 1956 (DATED 4 JANUARY 1955)

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., 4 de Enero de 1955.

Dear Judge Hudson:

Dr. Davila and I have read very carefully your opinion on our boundary question with Nicaragua. Even though this opinion is not entirely favorable to the interests of Honduras, as this Government would wish, we consider it highly valuable as it comes from one of the most prominent world authorities on International Law, and due to the fact that said opinion, clear and final, has led us to seek a new solution to the problem.

I wish to inform you, very confidentially, that while in Washington I talked for two hours with Mr. Holland, to whom I acquainted in detail with our boundary problem and our intention to submit same, if necessary, to the Organization of American States. Mr. Holland showed a great deal of interest and promised, that although in an informal way, he would advise Nicaragua to accept the jurisdiction of the International Court of Justice. I learned later that the Nicaraguan Ambassador in Washington had been called by Mr. Holland and that he had left shortly after for Nicaragua, presumably to report to his Government. I am waiting for results of said move and on learning definite news I shall be glad to communicate same to you.

. . . .

On behalf of the Honduran Government I hereby express to you our deepest gratitude for your cooperation and endeavors in this highly important matter, in which we trust you will continue to render us the assistance of your experience and knowledge.

Very truly yours,

(*Signed*) Esteban MENDOZA.

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3. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 9 MAY 1956

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 9, 1956.

Honorable Dr. Hudson:

. . . .

Yesterday I received some news which I deem of great interest for requesting the execution of the *Award of King of Spain*; before the International Court of Justice. As you will see, it is something which bears relation with report you sent me.

The Honduran Ambassador to Managua has sent me copies of *La Gaceta*, Nicaraguan official daily, corresponding to various dates of the year *1935*, bearing publication of minutes of the Nicaraguan Senate and of the Nicaraguan Chamber of Deputies, ratifying Protocol of Signature and Statute of the Permanent Court of International Justice. I have ordered translation of these documents and will forward same to you as soon as possible.

Up to this moment we have been unable to find the Ratification Decree of said Protocol. However, in view of the fact that Minutes of the Senate and of the Chamber of Deputies were published in the Nicaraguan official daily, I consider that this alone constitutes sufficient evidence to establish that Nicaragua ratified the Protocol and the Statute and therefore declaration made by Mr. Medina in 1929 acknowledging the Court's compulsory jurisdiction, is at present in full force.

The finding of these documents makes me feel more optimistic and I trust that we will soon find the Ratification Decree. At any rate, I would like to have your opinion in this matter after you have read the above mentioned ratification minutes.

I take pleasure in expressing to you once more my deep appreciation for your valuable cooperation and beg to remain

Very truly yours,

(*Signed*) Esteban MENDOZA.

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4. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 9 MAY 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

9 May 1956.

My dear Mr. Minister:

I have another thought on the letter of 2 May 1956.

1. I am not too much put off by the fact that the Nicaraguan proposal would mean that we hold up the Application for seven months plus. That is not very long.

2. The Nicaraguan Government makes the proposal of postponement. There is no onus falling on you as a consequence of acceding to that postponement.

3. I think it is possible that we could get up the Case by that time. It would then be possible to file the Application and the Case together.

With warm regards, I am

Sincerely yours,

(*Signed*) Manley O. HUDSON.

P.S. The above is independent of the condition that you would attach to Nicaragua's action, namely, that she recognizes the declaration of September 24, 1929. I think it is possible for you to say that the declaration of 1929 was put into force as a consequence of the ratification of the Protocol and Statute of November 29, 1939.

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5. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 15 MAY 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

15 May 1956.

My dear Mr. Minister:

. . . .

1. I am much interested in the news sent to you by the Honduran Ambassador

to Managua. According to him, the Nicaraguan *La Gaceta* has published minutes of the Nicaraguan Senate and Chamber of Deputies ratification of the Protocol of Signature and the Statute of the Permanent Court of International Justice. I shall await most eagerly the receipt of the documents which you are forwarding to me.

2. I am a bit upset by the mention of 1935. I had not before known of that date as being material. We shall, however, get out the *La Gaceta* here, and shall see what is available on that. Please send me the translation of the documents, and the original, as soon as possible.

3. I note that you have been unable to find the Nicaraguan Ratification Decree of the Protocol. The situation was as follows: On September 24, 1929, Nicaragua accepted the jurisdiction of the Court. Nicaragua was not at the time a Member of the Court. It depended upon Nicaragua's becoming a Member of the Court. On November 29, 1939, I have argued that Nicaragua became a Member of the Court, and consequently that she became bound by the jurisdiction of the Court. I explained the lack of an instrument of ratification by saying that it may have been due to lack of international communications in 1939.

4. You ask me as to whether finding the minutes of the Senate and Chamber of Deputies "alone constitutes sufficient evidence to establish that Nicaragua ratified the Protocol and the Statute and therefore declaration made by Mr. Medina in 1929 acknowledging the Court's compulsory jurisdiction". This seems to me to take an optimistic and hopeful view. I should dislike presenting that as evidence of that fact, but this would depend on what is in *La Gaceta*. I shall have to see that first. We are sending for the *La Gaceta* today, and I will write you further.

With deep expression of my warm regard for your valuable cooperation, I remain

Very sincerely yours,

(*Signed*) Manley O. HUDSON.

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6. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 18 MAY 1956

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 18, 1956.

Distinguished Doctor Hadson:

In fulfillment of the promise made in my previous letter, I am pleased to enclose English translations of the Minutes of the Senate and Chamber of Deputies of Nicaragua, in which appear the ratification made in the year *1935* to the Protocol of Signature and Statutes of the Permanent Court of International Justice. Dr. Dávila, who is temporarily in this city, and I, are of the opinion that with these documents we have a sure basis on which to establish the jurisdiction and competency of the International Court of Justice to resolve the petition which Honduras is to present against Nicaragua.

In the very near future I will also send to you the translation of the Minutes of the Senate and Chamber of Deputies of Nicaragua, ratifying the Treaty which was entered in 1928 into between Nicaragua and Colombia, under the terms of which recognition is made that the sovereignty and complete dominion of Nicaragua extend to the Cape of Gracias a Dios. You will see that in such official Minutes, not even a slight allusion or reservation is made on the part of Nicaragua with respect to any other territory beyond the Cape of Gracias a Dios. These documents will also serve for the purpose of proving, that even though indirectly, Nicaragua recognized in said Treaty the validity of the *Award of the King of Spain*.

I am concluding the preparation of a list of comments to the draft that you sent me with respect to the Application which is to be presented to the Court.

I have received your letters of the 7th and 9th of this month, the contents of which I have noted.

When I suggested that the Chancery of Nicaragua make a formal declaration confirming the validity of the Declaration made by Mr. Medina in 1929, I did not then have available the Minutes, translation whereof I now send to you. In view of the lack of reliability on the part of the Government of Nicaragua with respect to the execution of the *Award of the King of Spain*, we have no confidence in a simple promise of such Government to appear before the Court, when the petition for the execution of the Award is presented. On the other hand, if the Nicaraguan Chancery makes the declaration in the general form suggested by us, that is to say, without making any allusion to the Nicaragua-Honduras boundary question, two results would be obtained:

(*a*) Assuring the competence of the Court for the purpose of resolving the petition; and

(*b*) Assuring that the Nicaraguan people have no knowledge of the matter, in view of the fact that for political reasons, General Somoza does not deem it convenient that the Nicaraguan people know what he expects to do, prior to his election.

. . . .

Manifesting my greatest consideration, I beg to remain
Respectfully yours,

(*Signed*) Esteban MENDOZA.

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7. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 23 MAY 1956

23 May 1956.

My dear Mr. Minister:

1. I thank you very much for having sent me the English translation of the Minutes of the Senate and Chamber of Deputies of Nicaragua in 1935.

2. Since you called to our attention the year 1935, we have been examining *La Gaceta* of Nicaragua, and our search has yielded about the same results as yours. We have the records of the legislative proceedings, including those of February 14, 1935 and July 11, 1935 (*La Gaceta*, Vol. 39, No. 130, p. 1033; and No. 207, p. 1674), showing the approval of the Protocol of Signature and Statute of the Permanent Court.

3. I wish I could share the view which you and Dr. Dávila have that the documents supply a "sure basis on which to establish the jurisdiction and competency of the International Court of Justice". I am inclined to think that this is going a little too fast. We have not discovered any document by which

the President has ratified the Protocol of Signature, or any document which he signed and which he sent forward to the Secretary-General of the League of Nations as required by the Protocol of Signature of December 16, 1920; the Protocol says that "Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers". It would be normal for such texts to be printed in *La Gaceta*. The Secretariat of the defunct League of Nations has no record of ever receiving the instrument of ratification, but I shall verify this.

4. I shall be glad to have the translation of the Minutes of the Senate and Chamber, approving the Treaty between Nicaragua and Colombia of 1928. We already know it was ratified, for it was published in the *League of Nations Treaty Series* (Vol. 105, p. 337 ff.), which requires ratification.

With assurances of high esteem,

Very sincerely yours,

(*Signed*) Manley O. HUDSON.

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8. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 1 JUNE 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

1 June 1956.

My dear Mr. Minister:

1. I have this morning your letter of May 26, 1956, and I want to thank you very much for your criticism of my draft. It has been a terrific job to me, and I appreciate it all the more that you could take the time to review it. I shall review your points one by one.

2. You will note in my revised draft that there are many changes made. Some of these changes bear upon the points that you have made, but perhaps they do not do so sufficiently.

3. I do not think that it is "according to international law and current practice" that there should be any indication of previous difficulty. At any rate, it will sufficiently appear from my Application that there is a serious disagreement. In this connection, I am surprised to hear that Honduras has sent communications on July 11, 1955, and January 12, 1956, to Nicaragua. I don't know what these communications involve, but I urge you very much to hurry up the copies for me. If, on September 29, 1955, Nicaragua used the same words as in 1912, it is not necessary that we should review that; but if they used different words it may be necessary for us to pay attention to it.

4. Your point about the Nicaraguan Senate and Chamber of Deputies having ratified the Protocol of Signature and the Statute of the Court seems to me entirely superfluous. They have *consented* to the ratification, at the most. I wish it were true, but it cannot be true according to the Nicaraguan Constitution. I wrote you a letter yesterday which explains my stand on this.

5. I am glad to get your point about the location of Danli. I knew that Danli was in Honduras, but somehow it slipped me.

6. I do not agree that we should ask for indemnity for the expense of Honduras in opposition to what Nicaragua has done. It has been too many years, and too

much has been done. However, I think that we might ask for the expense of this Court action. I think so for the time, at any rate, and I shall think further on it.

With assurance of my high esteem, I am

Faithfully yours,

(*Signed*) Manley O. HUDSON.

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9. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 4 JUNE 1956

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., 4 de Junio de 1956.

Honorable Judge Hudson:

I have the honor to refer to your letters of May 23rd and 31st of 1956.

I note that you are not of the opinion that ratification by the Nicaraguan Senate and Chamber of Deputies to Protocol and Statute of the Permanent Court of International Justice is sufficient for establishing the jurisdiction of present International Court of Justice, due to the fact that the Nicaraguan President has not taken any steps to "ratify" said Protocol and send same to the Secretary of the League of Nations, as he was supposed to do in accordance with stipulations of said Protocol.

In this regard allow me to state that in Honduras and Nicaragua, as well as in most Latin American countries, procedure for ratifying international treaties is different from that applied in the United States. In Honduras and Nicaragua, once a treaty or convention has been subscribed, the President of the Republic approves it through a special decree and submits same to the Legislative Chambers for ratification. Therefore, it is the Legislative Chambers and not the President, properly speaking, who ratify treaties and once same are ratified the only requirement to be fulfilled is that the President should effect exchange or deposit of ratification, whether it be a bilateral or multilateral treaty. On the other hand, in the United States the Senate with a two-thirds majority of votes present, merely gives its advice and consent for the President to ratify treaty, should the latter deem it convenient to do so. Therefore, in the United States — contrary to procedure in force in our countries — the President and not the Senate has the power to ratify treaties. In this respect, Prof. Julius W. Pratt in his book entitled *A History of United States Foreign Policy*, on page 17, states:

> "It is to be emphasized here that, popular opinion and phraseology to the contrary notwithstanding, the Senate does not 'ratify' treaties. It merely gives its advice and consent in favor of the treaty. Ratification is an executive act, performed by the President after the Senate has consented. The President, however, is not required to ratify a treaty that the Senate has approved."

In view of the fact that the Nicaraguan Legislative Chambers have ratified the Signature and Statute Protocol, it is to be expected that Ratification Decree was also issued and we are anxiously searching for same, even in the publications of the Congress Library in Washington. If, as we hope, this decree is finally located, the only missing requirement would be to forward such ratification instrument to present Secretary of the United Nations, thus fulfilling, although late, offer made by the Nicaraguan Chancery by special cable, in 1939, to the Secretary-General of the League of Nations.

On the above expressed reasons both Dr. Dávila and I have based our opinion. Nevertheless, neither of us pretend that our opinion be conclusive.

Herewith enclosed you will find translation of notes exchanged between Honduras and Nicaragua regarding the execution of the *Award of His Majesty the King of Spain.*

Allow me to offer you once more, most Honorable Judge, my deep esteem and consideration.

Very truly yours,

(Signed) Esteban MENDOZA.

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10. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 6 JUNE 1956

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., June 6, 1956.

Distinguished Dr. Hudson:

. . . .

Due to the existing dissenting opinions of Honduras and Nicaragua regarding the validity or invalidity of the King of Spain's Award, we do not believe that it is possible to submit question, through a Special Agreement, to the decision of the International Court of Justice, and in such a case we would have to start proceedings through an Application.

Yesterday I had the pleasure to receive the draft of Application by Honduras against Nicaragua, which I consider a juridic work of great merit for initiating the defense of the rights of Honduras. However, please allow me to make a few remarks thereon:

(a) It appears on page 6, referring to the Nicaragua Situation, that the Protocol of Signature and the Statute of the Permanent Court of International Justice was signed on September 14, 1929, but that the Protocol was not ratified until about ten years had passed. It seems to me that this statement is not in accord with the facts, as ratification of the Statute and Protocol by the Nicaraguan Senate took place on February 14, 1935, and by the Chamber of Deputies on July 11, 1935, such as appears on page 7, numeral 12 of Application.

(b) I wish to make it clear that the Nicaraguan Legislative Chambers did ratify, in fact, the Statute and Protocol, and that they not just *consented* to ratification of same.

(c) Don't you think it is necessary to mention the last notes exchanged between the Honduras and Nicaragua Foreign Offices, trying to obtain execution of the Award of Spanish King through a direct agreement between both countries?

I deem it an honor to remain, Honorable Judge Hudson,
Very truly Yours,

(Signed) Esteban MENDOZA.

11. LETTER TO MANLEY O. HUDSON FROM JUDGE JORGE FIDEL DURÓN, DATED 24 AUGUST 1957

Tegucigalpa, D.C.,
August 24, 1957.

Dear Dr. Hudson:

The following are some of the ideas suggested by Dr. Ramon E. Cruz in connection with both the Application and Memorial on which you are now working. As time is running fast kindly examine his projected additions as follows:

1. A chapter should be added to the present Application advancing the expressed recognition of the rights of Honduras by the Louisiana-Nicaragua Lumber Company in a concession which said American company obtained in Nicaragua in 1906 in which the territory of Honduras was affected. We have records proving that said Company began its payments into the Honduran Treasury in 1911 until 1926. We are investigating whether said payments continued after 1926 as it may be that the concession lapsed or the company disappeared. We shall endeavor also to find out if any other company is in an analogous position.

2. Both in the Application and in the Memorial we should be careful not to say that the date of ratification of the Bonilla-Gamez Treaty was ratified on January 3, 1895, because such is the date of the approval of this instrument by the Nicaraguan Executive Power and it is not in fact the date of ratification by the Nicaraguan Congress. In this respect it is important to mention that the Nicaraguan Constitution in force in 1895 was the 1893 Constitution which entered into force on July 11, 1894. Ordinarily the Nicaraguan Congress convened on August 1 and it met in January only when a new president was sworn in. President Zelaya was in power in his first term in 1895 and the Constitution was amended on December 15, 1896, that was the time when the bicameral system was adopted.

3. We believe and recommend that your arguments about the jurisdiction of the Court should be maintained as stated in the Application and in the Memorial because, regardless of the Act of July 21, 1957, legally both States were subject to the competency of the Court and your sound arguments fortify our position. You are right in saying that this Act takes care of the question of jurisdiction but we submit that your allegations be kept in both documents only to be reinforced by the Act. We suppose that such Act signed by the Nicaraguan Foreign Minister and myself in Washington will be added as an Annex together with a brief statement to the effect that both States agreed solemnly to submit the matter to the decision of the Court. We already have your fine translation of the Act.

4. A summary narrative of the acts of the Organization of American States beginning with our first claim denouncing Nicaragua as an Aggressor should appear in the Memorial. The narrative would start with our first denunciation after the protest on account of the invasion and attack on Mocoron up to and including the Washington Act of July 21, 1957. Mention will be made of the creation of the Department of Gracias a Dios and following events. Dr. Cruz is now working on the Spanish text.

5. Finally, we are of the opinion, as agreed during our conversations in Boston, that the Application as well as the Memorial, should include in the plea the nomination and designation of a Mixed Commission for the fixing of the landmarks in the section comprised between the Portillo de Teotecacinte and the

confluence of the Poteca or Bodega river with the Guineo or Namasli river. As you well remember, our settlement plan with Nicaragua started thus, more recently we also agreed and now maintain such similar Mixed Commission to renew or fix anew the landmarks from the Pacific to the Teotecacinte Pass and we believe that we should ask the Court such a procedure as the most expedient way for the execution of the King's Award. You have already submitted the text of such a plea in the Application.

. . . .

The appointments made by the Military Junta include Dr. Cruz as Agent and Doctors Julian Lopez Pineda and Celeo Davilá as Honduran Counsellors. The first one is a lawyer, formerly our Delegate to the League of Nations, Minister in Paris and Managua. Dr. Davilá did not accept the appointment. In addition to the above we have our Minister Plenipotentiary in The Hague, Dr. Humberto Lopez Villamil, former Delegate to the UN General Assembly and as Secretaries young lawyers Robert Perdomo, now in Madrid, Roberto Reina, now in London and Enriqué Ortez, now in Paris serving in our regular diplomatic missions. The picture is completed by lawyer Roberto Palma Galvez, who will serve as General Secretary when the Special Mission leaves and by you, Richard Young and Maurice Bourquin, in case he accepts. Otherwise we shall appoint Dr. Henri Rolin at your indication.

Please let me have your reactions to the above points and, with kindest regards, believe me, as ever,

Your friend sincerely,

(*Signed*) Jorge Fidel DURÓN.

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12. LETTER TO MANLEY O. HUDSON FROM JORGE FIDEL DURÓN, DATED 13 SEPTEMBER 1957

Tegucigalpa, Honduras,
September 13, 1957.

Dear Mr. Hudson:

In view of the fact that your last letter from Geneva reported that you would leave on the 11th for Cambridge, this letter and further ones will be addressed to you there.

1. With Dr. Cruz we have reviewed your last and recent suggestions. After careful examination we have come to the conclusion that for the best interest of Honduras we must include in the Memorial the matter connected with the Louisiana-Nicaragua Lumber Company. We have pondered and decided that it is essential to do so because we are thereby reaffirming the jurisdiction and sovereignty of Honduras up to the left bank of the Segovia river. The inclusion in writing, instead of orally, to the Court in the Memorial will serve as a precedent in the future not only for our own present case but for any other that may present itself in the future. Please bear this in mind and kindly see that the reference is made expressly in the Memorial.

2. We also are coming back to the matter of the Bonilla-Gamez treaty ratification. The only date we can prove with documentary evidence to this moment is the date of approval by the Nicaraguan executive on January 3, 1895, while José Santos Zelaya was President and F. Vaca Foreign Minister. We should avoid mentioning the ratification date, by the Nicaraguan Congress — at that

time a single Chamber — and rely on the date of the Exchange of Ratifications in San Salvador on December 2[illegible] 1896. Note that in my last letter to you, by mistake, October was copied instead of December, which is the exact month.

3. Dr. Cruz and I want to insist that the Solemn Agreement of July 21, 1957, only reinforces and fortifies the arguments contained in your Memorial to establish the jurisdiction of the Court. Both the Agreement signed by the two Foreign Ministers and the Agreements signed also with the OAS do not modify in any way our position except reaffirming and recognizing said jurisdiction. Time and again our Delegation before the Organization of American States reiterated that the two countries had submitted to the jurisdiction of the International Court and that Honduras without prior agreement could bring Nicaragua into the Court to force her to comply with her international obligations. The Special Agreement was signed at the insistence of Dr. Luis Quintanilla who stated that such a pact gave it more force in guaranteeing the execution of the Court's decision by virtue of the intervention of the Organization. He even went so far as to insinuate that we could find difficulties at the Security Council in view of possible political pressure and, without mentioning, intimated the possibility of a veto even.

4. We understood from the same Organization of American States *Ad Hoc* Commission that the ratification of the Solemn Agreement of July 21, 1957, was unnecessary. For Honduras the problem is easily solved as the Junta Militar de Gobierno could draft a Decree of ratification and that would suffice according to our present set-up. However, in the case of Nicaragua this would complicate matters as they have two Legislative Chambers and in either one the text might hit snags, either refusing the approval or modifying the context of the Agreement. We have antecedents to expect such a course from Nicaragua. Therefore, we must move cautiously and in view of your latter reaction after consulting Dr. Julio Lopez Olivan perhaps it will be better to leave things alone. We are, anyway, obtaining the registration at the United Nations Secretariat and shall have the document ready. At any rate, we rely implicitly on your able and strong arguments in the Memorial to establish the competency of the Court and the allegation with regard to this Solemn Agreement may even be invoked orally as you have suggested in your letter of September 2.

5. Finally, please recall that we agreed as to the insertion of our petition, both in the Application and in the Memorial, for the fixing of the landmarks in the section comprising between the Portillo de Teotecacinte and the confluence of the rivers Poteca and Guineo. The reason, as you clearly must see, is that the compliance and execution of the Award is precisely that: the setting up of said landmarks to mark the boundary between the two countries. We do not agree that a mere oral argument would suffice in this case. Not only do we run the risk of overlooking such petition but also we need emphatically that such a record in writing remain permanently in our arguments in writing. We approve your text as agreed during our visit with you last July. Please note that in this we cannot deviate for otherwise we are leaving the rights of Honduras in jeopardy. We know that you fully appreciate our firm position on this.

It will be of interest for you to know that yesterday the Nicaraguan Government filed a new protest with us on account of our Decree of the Military Junta No. 124-A of August 5, 1957, creating two Departmental Districts in the Department of Gracias a Dios, that of Puerto Lempira and the one of Brus Laguna with jurisdiction which rightfully reaches up to the left bank of the Segovia river. We are now studying the protest in order to answer same because Nicaragua claims that such apportionment violates No. 3 of a Resolution of the OAS of July 5 asking both governments to maintain the present *statu quo* until the matter is solved. This article plainly covers our rights because it adds "without, for that, constituting an alteration of the legitimate rights of both parties". Our rights, of course, are clearly established over the region, this is a natural act of internal jurisdiction and the Royal Award confirms such rights and we have never accepted any other *statu quo*. I presume we must now add the new facts of the protest in our exposition.

Let me trust that your stay in Europe was a pleasant one and that you had a happy voyage of return home. Most sincerely yours,

(*Signed*) Jorge Fidel DURÓN.

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13. MEMORANDUM ON STATIONERY OF THE HONDURAN EMBASSY, DATED 4 JUNE 1958

Embajada de Honduras, Washington DC

MEMORANDUM

1. According to the Agreement of the Ministers of Foreign Relations of Honduras and Nicaragua July 21st, 1957, both countries accepted in the most ample terms the jurisdiction of the International Court of Justice to decide the "Diferendo" around the *Award of the King of Spain*, of December 24, 1906.

2. Nicaragua according to the declaration made by her Representative T. F. Medina, on September 24, 1929, came under the jurisdiction of that Court unconditionally.

3. The Agent of Honduras, Dr. Ramón E. Cruz, is of the opinion that in our Memorial it should be argued that Nicaragua is under the jurisdiction of the International Court according to the Agreement and the Declaration referred in Numbers 1 and 2 above.

4. One of the advisers of Honduras, Dr. Charles de Visscher, considers that it should only be mentioned the Agreement of the 21st of July, 1957, to support the jurisdiction of the Court and that it is unnecessary to mention the Declaration made by Medina with all the arguments that you expressed in the Memorandum you prepared for the Honduran Government.

5. The Minister of Foreign Affairs of Honduras wishes that you write a letter to Dr. Visscher, expressing your opinion about this matter. You could address the letter to the care of The Legation of Honduras, 82 Van Alkemadelaan, The Hague, Holland.

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14. LETTER TO CHARLES DE VISSCHER FROM MANLEY O. HUDSON, DATED 4 JUNE 1958

Dear de Visscher:

1. Dr. Celio Davilá, the Ambassador of Honduras at Washington, has brought me today a memorandum from his Government in which it is said that you have had some discussion with Dr. Ramón E. Cruz, the Agent of Honduras, about the subject of jurisdiction in the Honduras-Nicaragua case. I understand this related to the question whether the jurisdiction of the Court should be rested solely on the Agreement of 21 July 1957, or on both the Agreement and the prior declarations by the two Governments' accepting the Court's jurisdiction generally.

2. The two bases for jurisdiction seem to me important because they reinforce and complement each other. With both of them laid in full before the Court, there can be no possible doubt about the jurisdiction of the Court in the case.

Warmly yours,

(*Signed*) Manley O. HUDSON.

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15. LETTER TO RAMÓN CRUZ FROM MANLEY O. HUDSON, DATED 4 JUNE 1958

4 June 1958.

Dear Dr. Cruz:

1. I strongly advise that the jurisdictional provisions of the brief that you carried with you be kept.

2. There is some doubt in my mind about the Agreement of 21 July 1957. I wish this doubt to be expiated by the text as we have it.

Warmly yours,

(*Signed*) Manley O. HUDSON.

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16. LETTER TO MANLEY O. HUDSON FROM RAMÓN CRUZ, DATED 11 JUNE 1958

The Hague, June 11, 1958.

Dear Dr. Hudson:

I am very pleased to refer to your letter of June 4th addressed to Dr. de Visscher, copy of which you were so kind as to send to me.

(1) I have been very pleased to note that your points of view concerning the recognition by Nicaragua of the Court's jurisdiction were entirely correct and that the Application and Memorial will be supported by the Declaration of Medina made in 1929 and by the Agreement of Washington of July 21, 1957.

(2) In my note No. 1 of May 26th ult., addressed to the Minister of Foreign Relations of Honduras, I said:

> "I would like to make it very clear that there have been no differences in opinion between Dr. Hudson and the European Counselors and that the disagreement was probably due to misinformation. On reading the paragraphs concerning the jurisdiction and the request for judgement, Dr. de Visscher found that there were no differences of great importance regarding the presentation of our affair."

I would appreciate it very much if you would kindly send me by airmail two photostatic copies of the *Gacetas* of Nicaragua containing the ratification of the Statute and Protocol of the Permanent Court of International Justice. (*Gaceta*, 39th Year, No. 130, page 1033, and No. 207, page 1674.) The bill for these services should be sent to the Ministry of Foreign Relations at Tegucigalpa for payment.

With kindest personal regards to Mrs. Hudson and to your son, I am

Sincerely yours

(*Signed*) Ramón E. CRUZ.

Exhibit C

EXCERPTS FROM LEGAL OPINIONS OF SUZANNE BASTID, DATED 3 AUGUST 1956, AND CHARLES ROUSSEAU, DATED 21 JUNE 1956, ON THE MATTER OF THE BOUNDARY BETWEEN NICARAGUA AND HONDURAS

Attached hereto are excerpts of the portions of legal opinions prepared by Professors Suzanne Bastid and Charles Rousseau concerning Nicaragua's acceptance of the compulsory jurisdiction of the International Court of Justice. The excerpt from Professor Bastid's opinion is the original French and verified by Mme Bastid.

The excerpt from Professor Rousseau's opinion is an English translation of the Spanish version in the archives of the Government of Nicaragua; the original French version has not been located. The complete archive copies will be deposited with the Registry of the Court pursuant to Article 50, paragraph 2, of the Rules of Court.

EXCERPT FROM LEGAL OPINION OF SUZANNE BASTID, DATED 3 AUGUST 1956

Consultation sur la validité de la sentence arbitrale rendue par S. M. le roi d'Espagne, Alphonse XIII, le 23 décembre 1906, dans l'affaire des limites entre le Nicaragua et le Honduras et sur les voies de recours qui peuvent exister contre cette sentence

Je soussignée, Suzanne Bastid, professeur à la faculté de droit de Paris, membre de l'Institut de droit international, consultée par le Gouvernement du Nicaragua sur la validité de la sentence arbitrale rendue par S. M. le roi d'Espagne, Alphonse XIII, le 23 decembre 1906 dans l'affaire des limites entre le Nicaragua et le Honduras et sur les voies de recours qui peuvent exister contre cette sentence, ai émis, sur la base des documents qui m'ont été communiqués, l'avis suivant :

FAITS

I. A la suite de la proclamation au Guatemala le 15 septembre 1821 de l'indépendance de l'Amérique centrale, le Nicaragua et le [Honduras]...

. . . .

que l'illégalité du protocole d'arbitrage constituant S. M. le roi d'Espagne comme arbitre unique a été couverte par le comportement ultérieur du Nicaragua, il n'en reste pas moins que la sentence est entachée d'excès de pouvoir pour ne pas respecter les dispositions du traité Gamez-Bonilla de 1894 sur les règles à appliquer par l'arbitre pour rendre sa décision. En outre, il pourrait être sérieusement soutenu que la sentence contient des erreurs manifestes affectant sa validité.

XLII. *DEUXIÈME QUESTION*

Dans la négative, c'est-à-dire si l'on trouve que ladite sentence arbitrale est nulle et non obligatoire parce qu'elle n'est pas conforme au compromis d'arbitrage et aux règles du droit international, le conseil juridique devra indiquer :

a) *quelles seraient les actions ou les exceptions que le Nicaragua pourrait faire valoir pour obtenir la déclaration de nullité ;*

b) *l'organisme ou tribunal auquel une telle demande pourrait être soumise ;*

c) *la façon de présenter la demande ou la contre-demande.*

XLIII. La présente question est relative à la possibilité d'une «déclaration de nullité» de la sentence arbitrale. Une «déclaration de nullité» ne peut être que le fait d'une autorité ayant un pouvoir de décision dans le domaine juridique entre Etats souverains. Ce pouvoir appartient exclusivement à la Cour internationale de Justice, à un arbitre, aux deux Etats souverains agissant de concert. On recherchera successivement comment ces trois voies pourraient être suivies et dans quelles conditions le problème de la déclaration de nullité de la sentence arbitrale pourrait être posé.

XLIV. *Recours à la Cour internationale de Justice :*

Avant d'examiner quelle question pourrait être posée à la juridiction internationale, il convient d'examiner à quelles conditions elle peut être saisie.

Il faut relever tout d'abord que le Honduras a renouvelé pour six ans, le 24 mai 1954, une acceptation de la juridiction obligatoire de la Cour qui datait du 10 février 1942, sous réserve de réciprocité pour tous différends d'ordre juridique énumérés dans l'article 36 du Statut.

Quant au Nicaragua, l'*Annuaire* de la Cour internationale (*Annuaire 1954-1955*, p. 189) mentionne sa déclaration du 24 septembre 1929, acceptant comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale. Ce faisant est appliqué l'article 36, alinéa 5, du Statut de la Cour qui dispose que :

> «Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes.»

Toutefois une difficulté surgit à raison des conditions mêmes dans lesquelles la déclaration du Nicaragua a été faite en 1929.

Le Statut de la Cour permanente était annexé à un protocole de signature du 16 décembre 1920 qui disposait qu'il devait être ratifié et que chaque puissance adresserait sa ratification au Secrétariat général de la Société des Nations par les soins duquel il en serait donné avis à toutes les autres puissances signataires. Le Nicaragua a signé le protocole le 14 septembre 1929.

Le protocole pour la revision du Statut du 14 septembre 1929 a prévu sa ratification et le dépôt des instruments de ratification entre les mains du Secrétaire général qui en informera les membres de la Société et les Etats mentionnés dans l'annexe du pacte. Ce protocole a été signé par le Nicaragua le 16 septembre 1929, mais ce n'est que le 30 novembre 1939 que le Secrétariat de la Société des Nations a reçu un télégramme déclarant que la ratification du Statut et du protocole était intervenue, mais l'instrument annoncé n'a pas été envoyé à Genève. Le «dépôt de cet instrument n'a pas été notifié au Greffe», signale l'*Annuaire 1946-1947* de la Cour (p. 206, note 2). Dans ces conditions l'avis de ratification n'a pu être donné aux Etats visés par le protocole.

Cette situation permet de douter que le Nicaragua ait été partie au Statut de la Cour permanente.

En effet, la ratification est un acte interne. Quand le traité prévoit l'échange des ratifications c'est à ce moment seulement, sauf disposition contraire, qu'il devient obligatoire.

Quand le traité prévoit le dépôt des instruments de ratification «le procès-verbal de dépôt a la même importance juridique que le protocole d'échange des ratifications» (Bittnar, *Die Lehre von den Völkerrechtlichen Vertragsurkunden*, par. 32, p. 272 et suiv. ; Basdevant, «Conclusion et rédaction des traités», *Recueil des cours de l'Académie de droit international de La Haye*, t. 15, 1926, p. 52). Ainsi, faute de dépôt de l'instrument de ratification, l'Etat n'est pas lié juridiquement.

Le Nicaragua n'ayant pas été partie au Statut de la Cour permanente, la déclaration faite le 24 septembre 1929 peut-elle produire ses effets depuis que cette puissance est devenue, comme membre des Nations Unies, partie au Statut de la Cour internationale?

La question pourrait être discutée, en faisant valoir qu'une acceptation de la juridiction obligatoire privée d'effet sous l'empire du Statut de la Cour permanente ne pourrait en recevoir en application du Statut de la Cour internationale.

Toutefois un examen attentif des textes semble écarter cette interprétation. L'article 36 du Statut de la Cour permanente prévoit que les membres de la Société des Nations pourront reconnaître dès à présent comme obligatoire la juridiction de la Cour «lors de la signature» du protocole. Cette déclaration n'est pas soumise à ratification.

Par ailleurs, le paragraphe 5 de l'article 36 du Statut de la Cour internationale parle des déclarations faites en application de l'article 36 du Statut de la Cour permanente sans exiger qu'elles aient été faites par un Etat partie à ce dernier Statut à la différence de ce qui est prévu au paragraphe 2 de l'article 36 actuel.

Dans ces conditions on peut soutenir que la déclaration faite par le Nicaragua rentre bien dans le cadre prévu par le paragraphe 5 de l'article 36 actuel. Telle est d'ailleurs la solution qui résulte de l'*Annuaire* de la Cour (voir *Annuaire 1954-1955*, p. 189). Sans doute n'engage-t-elle pas la Cour, mais elle n'a pu manquer de faire l'objet d'un examen attentif du Greffe.

En conclusion, la compétence obligatoire de la Cour existe pour tous les différends énumérés à l'article 36, alinéa 2, dans les rapports entre le Honduras et le Nicaragua.

XLV. Il faut par ailleurs examiner l'engagement relatif à la juridiction de la Cour résultant pour ces deux Etats du traité américain de règlement pacifique, dit pacte de Bogotá, du 30 avril 1948. D'après les informations qui ont été fournies ce traité a été ratifié par le Honduras et le Nicaragua et les ratifications ont été déposées. Il est donc en vigueur entre ces deux Etats.

. . . .

En conclusion on peut relever dans la sentence des erreurs sérieuses qui n'en affectent pas toutefois la validité. Celles-ci ne pourraient être invoquées que devant une juridiction arbitrale ou judiciaire ayant reçu des deux parties en cause une compétence d'appel.

Fait à Paris, le 3 août 1956.

(*Signé*) S. BASTID.

EXCERPT FROM LEGAL OPINION OF CHARLES ROUSSEAU, DATED 21 JUNE 1956 (SPANISH VERSION FROM NICARAGUA'S ARCHIVES, AND ENGLISH TRANSLATION)

[Spanish text not reproduced]

4. Search for a Judicial Solution

32. Taking into account this situation, the undersigned has been asked to examine "what actions or exceptions could Nicaragua undertake to obtain revision of the Award". The most adequate procedure being of a jurisdictional kind, one is led immediately to examine whether recourse before the International Court of Justice would be capable of providing the Parties a satisfactory solution for their present difficulties. The effectiveness of said solution, however, depends upon considerations of two orders, at once of form and of substance, that it is appropriate to preview.

33. Taking into account the fundamental divergence of the two States with respect to the Award of 1906 and the significant failure of the procedure proposed in 1931 when the Protocol Irias-Ulloa was signed, one must exclude the possibility that the Government of Honduras would agree to submit the question of the validity of the referred Award to the International Court of Justice by means of an arbitration agreement. In this case the only way to bring this matter to the Court would be a unilateral application. Still, in this respect there exists a difficulty that should be indicated.

With respect to Honduras, it is completely beyond doubt that this Government is bound by the optional clause of compulsory jurisdiction. On May 24, 1954, it renewed the effect of the declaration, signed previously by it, accepting the clause, in conformity with Article 36, paragraph 4, of the Statute of the Court.

With respect to Nicaragua, the situation is more complicated. The Government of Nicaragua accepted "unconditionally" on September 24, 1929, the optional clause of compulsory jurisdiction of the Statute of the Permanent Court of International Justice although, on that date, it was not a party to the Statute of the Court. Ten years later, that is on November 30, 1939, the Government of Nicaragua announced officially to the Office of the Permanent Court that it sent its two instruments of ratification, of the Statute as well as of the Protocol of acceptance of the optional clause. But, for reasons that have not been explained, this declaration of intention appears not to have been followed with any effect, since neither of the indicated instruments of ratification arrived at the Office of the Permanent Court neither on the indicated date nor afterwards. Thus the *Yearbook* of the Permanent Court of International Justice never indicated that Nicaragua figured on the list of States bound by Article 36, paragraph 2, of the Statute. Likewise, in his work on *The Permanent Court of International Justice* (French translation, Paris, 1936, p. 138, n. 111 *in fine*), Professor Manley O. Hudson expressly places Nicaragua among the States that had not ratified the Statute of the Permanent Court.

According to the terms of Article 36, paragraph 5, of the Statute of the International Court of Justice,

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force are deemed, as between the Parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

Taking into account the conditions in which Nicaragua signed the aforementioned declaration of acceptance and the absence of transmittal of its instrument of ratification to the Secretary of the Permanent Court, it could appear that it does not figure among the States presently bound by the optional clause of compulsory jurisdiction. Still, the *Yearbook* of the International Court of Justice, in the successive editions published since its creation (see, for example: *Yearbook 1954-1955*, p. 35), expressly places Nicaragua among the States whose declaration of acceptance of the compulsory jurisdiction of the Court is presently in force,

> "these declarations were made in accordance with the terms of the Statute of the Permanent Court of International Justice, the remainder in accordance with the terms of the Statute of the International Court of Justice".

It is not possible, however, to give an absolute value to an indication of this nature taking into account that according to the terms of reference that appear in the preface of each *Yearbook*, prepared by the Registrar himself, "The Yearbook is prepared by the Registry, and in no way involves the responsibility of the Court" (see, for example: *Yearbook 1954-1955*, p. 7).

In these circumstances, it is to be feared that in case Nicaragua presented to the Court, by means of unilateral application, the problem of the validity of the Award of December 23, 1906, Honduras could oppose with prejudice the question of the validity of the declaration of compulsory jurisdiction of the International Court of Justice, since this declaration has not been accompanied by the transmittal of the instrument of ratification to the Registrar, which should have occurred normally 27 years ago. A prudent precaution on the part of Nicaragua would consist, in these circumstances, of repairing as quickly as possible the omission of 1939 to eliminate a new source of possible difficulties with Honduras in the hypothesis that the International Court of Justice could be called upon to know the controversy. Without doubt, by the sole fact of having signed and ratified the Charter of the United Nations, Nicaragua forms part "*ipso facto*" of the Statute of the International Court of Justice, by application of Article 93, paragraph 1, of the Charter and its absence of participation in the aforementioned jurisdictional organ could not be objected to now, as before 1940. But its quality as a State bound by the optional clause is more doubtful, by the fact that it is bound by Article 36, paragraph 2, of the new Statute only in the same conditions in which it was in relation to Article 36, paragraph 2, of the Statute of 1920. In any case there is an ambiguity that it is convenient to remove as soon as possible.

Exhibit D

LIST OF UNITED STATES FEDERAL COURT DECISIONS CITING TREATIES IN FORCE

The following federal court decisions cite *Treaties in Force* as authoritative evidence for the status of or parties to treaties to which the United States is a party.

DECISIONS OF UNITED STATES CIRCUIT COURTS OF APPEALS

1. *Salome Bara Arnbjornsdottir-Mendler* v. *United States*, 721 F. 2d 679, 682 (9th Cir. 1983). The court found that the 1902 and 1905 treaties between the United States and Iceland "have both been incorporated into US domestic law . . . and are included in *Treaties in Force* . . .".

2. *United States* v. *Monroy*, 614 F. 2d 61, 64 (5th Cir. 1980). The court cited *Treaties in Force* as sole authority that neither Colombia nor Panama has ratified the Convention on the High Seas.

3. *International Controls Corp.* v. *Vesco*, 593 F. 2d 166, 179 (2d Cir. 1979). The court noted that counsel for Vesco could not rebut evidence of "the 1978 list of *Treaties in Force*, issued annually by the Office of the Legal Adviser, Department of State, which states that the treaty was extended [to enumerated countries]".

4. *United States* v. *Cadena*, 585 F. 2d 1252, 1261 (5th Cir. 1978). The court cited *Treaties in Force* as evidence that Canada and Colombia have signed but not ratified the Convention on the High Seas.

5. *Hooker* v. *Klein*, 573 F. 2d 1360, 1363 & n. 1 (9th Cir. 1978). The court cited *Treaties in Force* as sole authority that the United States and Canada are parties to an extradition treaty.

6. *SCM Corp.* v. *Langis Foods Ltd.*, 539 F. 2d 196, 201 n. 10 (D.C. Cir. 1976). The court cited *Treaties in Force* as authority that the International Convention for the Protection of Industrial Property was revised twice and that Canada "has not accepted the substantive provisions of those revised versions".

7. *Narlidis* v. *Sewell*, 524 F. 2d 371, 374-375 (2d Cir. 1975). Both the trial and the appellate courts found that "[t]he 1902 Convention between the United States and Greece is in force and effect . . . as evidenced by the volume, *Treaties in Force*, published by the United States Department of State, 1 January 1973 . . .".

8. *United States* v. *Toscanino*, 500 F. 2d 267, 277 (2d Cir. 1974). The court relied solely on *Treaties in Force* to identify parties to the Charter of the United Nations and to the Charter of the Organization of American States.

9. *United States* v. *Martinez-Angosto*, 344 F. 2d 673, 676 (2d Cir. 1965). The court cited *Treaties in Force* as sole authority that "the Treaty [of General Relations and Friendship with Spain] is presently binding on the United States".

10. *Lopez* v. *SS. Ocean Daphne*, 337 F. 2d 777, 780 & n. 6 (4th Cir. 1964). The court cited *Treaties in Force* as sole authority that the United States and Liberia are parties to the Convention on the High Seas.

DECISIONS OF UNITED STATES DISTRICT COURTS

11. *Jet Traders Investment Corp.* v. *Tekair, Ltd.*, 89 F.R.D. 560, 567 (D. Del. 1981). The court cited *Treaties in Force* as sole authority that Angola "is not a

signatory to and has never formally adhered to" the Convention on the International Recognition of Rights in Aircraft.

12. *National Association of Property Owners* v. *United States*, 499 F. Supp. 1223, 1268 (D. Minn. 1980). The court cited *Treaties in Force* as sole authority for language in the Root-Bryce Treaty Between the United States and Great Britain.

13. *Chapalain Compagnie* v. *Standard Oil Co. (Indiana)*, 467 F. Supp. 181, 187 (N.D. Ill. 1978). The court cited *Treaties in Force* as authority for the Convention on the International Regulations for Preventing Collisions at Sea.

14. *Samaca* v. *Cooperative Association*, 297 F. Suppl. 345, 349 (D. Puerto Rico 1969). The court cited *Treaties in Force* as sole authority that "[s]aid Treaty [of Friendship, Commerce and Navigation Between the United States and Denmark] although not listed in the annotations of 9 U.S.C. [United States Code] § 2 is actually in force between these two nations".

15. *Aerovias Interamericanas de Panama, S.A.* v. *Board of City Commissioners*, 197 F. Supp. 230, 240 & n. 1 (S.D. Fla. 1961). The court cited *Treaties in Force* as sole authority that "while [the Bilateral Air Transport Service Agreement] was not individually ratified by the Senate as a treaty, it is classified as such by the State Department [cite to *Treaties in Force*] and it is considered to be a compact having equal dignity with formal treaties in every respect".

16. *United States* v. *Esperdy*, 187 F. Supp. 378, 380 & n. 1 (S.D.N.Y. 1960). The court cited *Treaties in Force* as sole authority that although one article was terminated, the Treaty of Friendship and General Relations Between the United States and Spain "otherwise remains in full force and effect".

Exhibit E

Treaty Lists Referred to in the Speech of Professor Brownlie

1. LISTE DES TRAITÉS ET ACCORDS DE LA FRANCE EN VIGUEUR AU 1ER JANVIER 1982 (PARIS, DIRECTION DES JOURNAUX OFFICIELS 1982), PP. 368-369.
2. VERTRÄGE DER BUNDESREPUBLIK DEUTSCHLAND, ERGÄNZUNGSBAND, *VERZEICHNIS UND STAND DER VERTRÄGE* (AUGUST 1979), P. A600-41.
3. SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER (STOCKHOLM 1948), P. 200.
4. TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN (1956), P. 45.

Exhibit F

CONGRESSIONAL RECORD, 1 AUGUST 1946 (P. 10618)

I was highly gratified, Mr. President, when I walked into the Senate Chamber this afternoon, after having been called away on important business, to find that the Senate was considering the resolution in executive session. In my opinion that entirely removes any question that may be raised in the future as to whether or not we have acted according to our Constitutional legislative processes, and in my opinion if the resolution is now adopted by a two-thirds majority in executive session, the question of the jurisdiction with which we vest the International Court of Justice cannot be questioned. That is why I took the position which I did last night. I get some satisfaction out of the fact that the position I took last evening on what was proper legislative procedure on this resolution may have had some influence in causing the Senate to go into executive session for the consideration thereof. I join with my colleague in expressing the hope that the resolution will be adopted.

Mr. Hill obtained the floor.

Mr. Vandenberg: Mr. President.

Mr. Hill: I understand the distinguished Senator from Michigan desires to ask a question of the Senator from Utah. I yield to him for that purpose.

Mr. Vandenberg: I thank the Senator. I call the attention of the Senator from Utah to the committee report at page 6, and I want to ask for a clarification of the language in what purports to be the reply of Hon. Charles Fahy, legal adviser of the State Department; to the suggestions which were made by Mr. John Foster Dulles. I call the Senator's attention to the fifth paragraph from the bottom of page 6, in which the legal adviser of the State Department is quoted as follows: "Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the court."

Does that mean that it is the attitude of the State Department that jurisdiction should be compulsory only when all other parties to the dispute have previously accepted the compulsory jurisdiction?

Mr. Thomas of Utah: That is my theory of reciprocity, and that is in keeping, I think, with the resolution itself.

Mr. Vandenberg: Yet the resolution itself says that we accept compulsory jurisdiction "without special agreement in relation to any other state accepting the same obligation". So I would think that the language of the resolution was directly contrary to the language of the recommendation by the State Department.

Mr. Thomas of Utah: The language of the legislation is in keeping with the charter and with the scheme.

Mr. Vandenberg: That was not my question. My question is whether or not it is in keeping with the recommendation of the State Department.

Mr. Thomas of Utah: I think it is. I think there is no inconsistency, as I read the English language. For instance, article 36, dealing with the jurisdiction of the Court, provides:

"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning ..."

And so forth. The same obligations of reciprocity, to my mind at least, I will say to the Senator from Michigan, stand out clearly in that language, and there is no question in my mind either as to the meaning of the language of the Charter or the meaning of the resolution in this particular.

Mr Vandenberg: If the Senator will bear with me for a moment longer, I will say that I think we are all in agreement as to the objective we are seeking; but, of course, it is highly important that we should be sure we have reached the objective. Mr. Dulles, who certainly is one of the great friends of international jurisprudence, as the Senator knows, has raised a question whether the language of the resolution might not involve us in accepting jurisdiction in a multilateral dispute in which some one or more nations had not accepted jurisdiction. It is my understanding that it is the opinion of the Senator from Utah that if we confronted such a situation we would not be bound to submit to compulsory jurisdiction in a multilateral case if all of the other nations involved in the multilateral situation had not themselves accepted compulsory jurisdiction. Is that so?

Mr Thomas of Utah: That is surely my understanding. I think reciprocity is complete. All the parties to the case must stand on exactly the same foundation, except that we may waive a right.

Mr Vandenberg: I notice that the committee report, at the top of page 7, deals with this precise point. It says that Mr. Dulles' objection might be met by another subsection in the first proviso of the resolution, on page 2, after line 14, reading as follows:

> "*(c)* Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction."

As I understand the Senator from Utah, he agrees with me that the situation defined in this suggested reservation is the situation which would exist without the reservation.

Mr Thomas of Utah: That is true; and since the Senator has used the word "reservation" I think that word is one that can well be avoided and dispensed with in the resolution, because the resolution is initiated by the Senate. It is not a part of an agreement with another nation. So that which the Senator has called a reservation would be a simple amendment to the resolution. I think it is better for us to realize that we are dealing from the beginning with this question, and if the Senator wishes to be doubly assured on a point with respect to which the Senator from Utah is already completely assured, I see no objection to the addition of:

> "*(c)* Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction."

The only thing the Senator from Utah is constantly thinking about is that it would be disastrous to the whole United Nations structure, after we have gone through the process of accepting the obligations of the United Nations and making a treaty with other nations of the world to live up to the United Nations structure, for the United States Senate to pass any measure which would in any way affect the structure of the United Nations. That is my stand. I would guard against any such action.

Mr. Vandenberg: I quite agree with what the Senator from Utah has said regarding my inadvertent use of the word "reservation".

Mr. Thomas of Utah: I do not want anything which we do here to be labeled as a reservation.

Mr. Vandenberg: I quite agree with the Senator. That was merely a colloquialism so far as I was concerned.

I was thinking of the addition on page 2, after line 14, of the precise language suggested in the committee report itself namely:

> "(*c*) Disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction."

It is my understanding that the able Senator from Utah would not object to the addition of that language in the pending resolution. I agree with him that it would not be a reservation. Surely we have the original authority without jeopardizing our objective at all, to add a third definition under the proviso in the resolution.

Mr. Thomas of Utah: Personally, I would be willing to go even further than does the Senator from Michigan on this single point. Under subclause (2) I would be willing to say, "The United States and other parties specially agree to jurisdiction". I think that is exactly what reciprocity means.

Mr. Vandenberg: Mr. President, will the Senator further yield?

The Presiding Officer (*Mr. Tennell* in the chair): Does the Senator from Utah yield to the Senator from Michigan?

Mr. Thomas of Utah: I yield.

Mr. Vandenberg: I agree with the Senator that that is what reciprocity means. In view of my very great respect for the judicial opinions of Mr. John Foster Dulles in this area of jurisprudence, I would be happier if we could spell it out, if the Senator agrees that that would be proper. At the appropriate time I shall offer such an amendment, and I understand that it will be with the approval of the Senator from Utah.

Mr. Morse: Mr. President, as the author of the resolution, I accept the suggestion of the Senator from Michigan.

ADDITIONAL DOCUMENTS SUBMITTED BY NICARAGUA IN CONNECTION WITH THE ORAL PROCEDURE ON QUESTIONS OF JURISDICTION AND ADMISSIBILITY

Liste des traités et accords de la France, en vigueur au 1er janvier 1982, par Marcel F. Surbiguet et Denys Wibaux, Paris, direction des journaux officiels, 1982, pp. iii-v and 368-369

[Not reproduced]

Verträge der Bundesrepublik Deutschland, Ergänzungsband, *Verzeichnis und Stand der Verträge*, I, Heransgegeben vom Auswärtigen AMT, Carl Heymanns Verlag KG, Bonn, Köln, Berlin, pp. 41 and 44

[Not reproduced]

Sveriges Överenskommelser med Främmande Makter, 1947, Stockholm, 1948, Kumgl. Boktryckeriet, P. A. Morstedt & Söner, pp. 199-200

[Not reproduced]

Tractatenblad van het Koninkrijk der Nederlanden, jaargang 1956 No. 1, A. *Titel, Overeenkomst inzake de oprichting van een Internationale Commissie voor de Internationale Opsporingsdienst, met Bijlage ; Bonn, 6 juni 1955, p. 45*

[Not reproduced]

DOCUMENTS SUBMITTED BY THE UNITED STATES OF AMERICA IN CONNECTION WITH THE ORAL PROCEDURE ON QUESTIONS OF JURISDICTION AND ADMISSIBILITY

1. 7 SEPTEMBER 1984 DRAFT "CONTADORA ACT FOR PEACE AND COOPERATION IN CENTRAL AMERICA (REVISED)". UNOFFICIAL ENGLISH TRANSLATION OF SPANISH ORIGINAL

CONTADORA ACT FOR PEACE AND COOPERATION IN CENTRAL AMERICA (REVISED)

Preamble

The Governments of the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua:

1. Aware of the urgent need to strengthen peace and cooperation among the peoples of the region through the observance of principles and measures that will permit greater understanding between the Central American governments;

2. Concerned by the situation in Central America, which is characterized by a serious erosion of political trust, border incidents, the arms race, arms trafficking, the presence of foreign advisers and foreign military presence in other forms, and the use by irregular forces of the territory of certain States for activities aimed at destabilizing other States of the region;

Convinced:

3. That the tensions and present conflicts could worsen and lead to a generalized large-scale war;

4. That the goal of restoring peace and confidence in the area can be achieved only through unconditional respect for the principles of international law, especially with regard to the right of peoples to choose, freely and without outside interference, the model of political, economic, and social organization best suited to their interests, through institutions that represent the freely expressed will of the people;

5. That it is important to create, develop, and strengthen democratic systems in all countries of the region;

6. That there is a need to create political conditions aimed at guaranteeing the security, integrity and sovereignty of the States of the region;

7. That genuine regional security can be achieved by means of agreements on security and disarmament;

8. That the national security interests of the States of the region must be taken into account in the adoption of measures for halting the arms race;

9. That military superiority as a political objective of the countries of the

region, the presence of foreign advisers and other foreign elements, and trafficking in arms endanger regional security and contribute to the destabilization of the area;

10. That agreements on regional security must be subject to an effective system of verification and control;

11. That destabilization of the governments of the area, reflected in general by the encouragement or support of activities of irregular groups or forces, acts of terrorism, subversion, or sabotage, and the use of the territory of a State for activities that affect the security of another State, violates the basic rules of international law and peaceful coexistence between States;

12. That the establishment of limits on military development based on stability and security needs in the region is highly advisable;

13. That the creation of instruments in order to implement a policy of détente must be based on the existence of a political trust between States that will effectively reduce political and military tensions between them;

14. *Recalling* the definition of aggression by the United Nations, particularly in General Assembly resolution No. 3314 (XXIX), and as contained in the pertinent resolutions of the Organization of American States;

15. *Taking into account* the declaration on strengthening international security, adopted as resolution No. 2734 (XXV) by the United Nations General Assembly, as well as the corresponding and relevant legal instruments of the Inter-American system;

16. *Reaffirming* the need to promote, in those cases where the society has been deeply divided, actions leading to national reconciliation that will allow the people to participate, under the law, in democratic political processes;

Whereas:

17. Beginning with the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948, various international organizations and conferences have drafted and adopted declarations, pacts, protocols, conventions and rules to effectively protect human rights in general and certain of those rights specifically;

18. Not all the Central American countries have accepted all existing human rights instruments, and it would be desirable for them to do so in order to constitute a more complete human rights regime that would result in the respect and guarantee of human, political, civil, economic, social, religious and cultural rights;

19. In many cases, flawed and antiquated or inadequate domestic laws impair the validity of human rights as defined in declarations and other international instruments;

20. Each State must concern itself with modernizing and adapting its laws so that they will guarantee the effective enjoyment of human rights;

21. One of the most effective means of establishing the validity of the human rights enshrined in international instruments and in the constitutions and laws of individual States is for the judicial power to have the authority and the autonomy it needs to put an end to violations of those rights;

22. To that end, the absolute independence of the judicial branch must be guaranteed;

23. Such guarantee will be obtained only if the judicial authorities enjoy stability with respect to their responsibilities and the judicial branch is financially stable so that its independence from other branches of government is absolute and undisputed;

Convinced:

24. Of the need to establish just economic and social structures that will consolidate a genuine democratic system and allow their peoples full access to the right to work, education, health and culture;

25. Of the high degree of interdependence among the countries of Central America and of the potential offered to small countries by the process of economic integration;

26. That the magnitude of the economic and social crisis affecting the region has demonstrated the need for changes in the economic and social structure that will reduce the dependency and foster the regional self-sufficiency of the Central American countries, enabling them to reaffirm their own identity;

27. That the process of economic integration in Central America is an effective instrument of economic and social development based on the principles of justice, solidarity and mutual advantage;

28. That there is a need to reactivate, improve and restructure the process of economic integration in Central America with the active participation of all States and institutions of the region;

29. That Central American institutions and authorities are called upon to assume primary responsibility in modifying current economic and social structures and strengthening the process of regional integration;

30. Of the need and the advisability of engaging in joint economic and social development programs that will contribute to the process of economic integration in Central America as part of the development plans and priorities adopted independently by those countries;

31. That investments are vital for the development and economic recovery of the Central American countries, which have cooperated with each other to obtain financing for specific, priority projects, and considering the need to extend and strengthen international, regional and subregional financial institutions;

32. That the regional crisis has resulted in massive flows of refugees, a situation that merits urgent consideration;

33. *Concerned* by the constant worsening of social conditions and of the situation with respect to employment, education, health and housing in the countries of Central America;

34. *Reaffirming*, without prejudice to the right to appeal to appropriate international fora, their desire to resolve their conflicts within the framework of the negotiating process sponsored by the Contadora Group;

35. *Recalling* the support granted to the Contadora Group through United Nations Security Council resolution 530, United Nations General Assembly resolution 38/10, and OAS General Assembly resolution AG/RES 675 (XIII-0/83); and

36. *Prepared* to implement fully the Document of Objectives and the measures for carrying out the commitments made in that document, adopted by their Ministers for Foreign Affairs at Panama City, on 9 September 1983, and 8 January 1984, respectively, under the auspices of the Governments of Colombia, Mexico, Panama and Venezuela, which comprise the Contadora Group,

Have agreed as follows:

THE CONTADORA ACT
FOR PEACE AND COOPERATION IN CENTRAL AMERICA

PART I. COMMITMENTS

Chapter I. General Commitments

Single Section. Principles.

The Parties undertake, in accordance with the obligations they have assumed under international law, to:

1. Respect the following principles:

   (*a*) renunciation of the threat or use of force against the territorial integrity or political independence of States;
   (*b*) the peaceful settlement of disputes;
   (*c*) non-interference in the internal affairs of other States;
   (*d*) cooperation of States in resolving international problems;
   (*e*) equal rights, free determination of peoples and respect for human rights;
   (*f*) sovereign equality and respect for sovereign rights;
   (*g*) refraining from discriminatory practices in economic relations between the States, respecting their systems of political, economic, and social organization;
   (*h*) fulfillment in good faith of the obligations assumed in accordance with international law;

2. In application of these principles they will:

   (*a*) Abstain from any action inconsistent with the objectives and principles of the United Nations Charter and the Charter of the Organization of American States that impairs the territorial integrity, political independence or unity of any of the States and particularly any such action that constitutes a threat or use of force.
   (*b*) Solve their disputes by peaceful means, by observing the basic principles of international law contained in the United Nations Charter and the Charter of the Organization of American States.
   (*c*) Respect the existing international boundaries between States.
   (*d*) Abstain from military occupation of the territory of any of the other States in the region.
   (*e*) Abstain from any type of military, political, economic or other coercive act intended to subordinate to their own interest the exercise by other States of the rights inherent in their sovereignty.
   (*f*) Take the steps necessary to guarantee the inviolability of their borders against irregular groups or forces seeking to destabilize the governments of neighboring States from within their own territories.
   (*g*) Refuse to permit their territories to be used to take action contrary to the sovereign rights of other States and ensure that the prevailing conditions in their territories do not threaten international peace and security.
   (*h*) Respect the principle that no State or group of States has the right to intervene directly or indirectly, through arms or any other form of interference, in the internal or external affairs of another State.
   (*i*) Respect the peoples' right to self-determination, without external intervention or coercion, by avoiding the threat or direct or covert use of force to weaken the national unity and territorial integrity of any other State.

Chapter II. Commitments relating to Political Matters

Section 1. Commitments relating to a Reduction of Regional Tension and the Encouragement of Trust

The Parties undertake to:

3. Encourage mutual trust by all means at their disposal and avoid any action likely to threaten peace and security in the Central American area.

4. Abstain from issuing or fostering propaganda in favor of violence or war as well as hostile propaganda against any Central American government, and comply with and disseminate the principles of peaceful coexistence and friendly cooperation.

5. To this end, their respective governmental authorities shall:

(*a*) Avoid any spoken or written declaration that may aggravate the existing situation of conflict in the area.

(*b*) Urge the mass media to contribute to understanding and cooperation between the peoples of the region.

(*c*) Encourage more contact and understanding between their peoples through cooperation in all areas related to education, science, technology and culture.

(*d*) Jointly consider future actions and mechanisms that will contribute to the attainment and improvement of a climate of stable and lasting peace.

6. Jointly seek a comprehensive regional solution that will eliminate the causes of tension in Central America and ensure the inalienable rights of the people in the face of foreign pressures and interests.

Section 2. Commitments relating to National Reconciliation

Each of the Parties will recognize the commitment of each of the other Central American States to its own people to guarantee the preservation of domestic peace as a contribution to the peace of the region, and to that end resolves to:

7. Take measures to establish and, if appropriate, improve representative pluralistic democratic systems that ensure effective participation by the people, politically organized, in the decision-making process and ensure that various opinion groups have free access to honest and periodic electoral processes, based upon full observance of the rights of citizens.

8. In those cases where deep divisions have occurred within the society, strongly encourage national reconciliation activities that allow fully guaranteed participation by the people in authentic democratic political processes on the basis of justice, freedom and democracy, and, to this end, create mechanisms that will permit a dialogue with opposition groups, according to the law.

9. Issue and, if appropriate, ratify, expand, and improve laws and regulations that offer true amnesty and allow their citizens to become fully reincorporated in political, economic and social life. In like manner, guarantee the inviolability of life, liberty and personal security for those who accept amnesty.

Section 3. Commitments relating to Human Rights

The Parties undertake, in accordance with their respective domestic laws and with the obligations they have assumed under international law, to:

10. Guarantee full respect for human rights and, to this end, comply with the

obligations contained in international legal instruments and the constitutional provisions on the subject.

11. Initiate their respective constitutional procedures so that they may become parties to the following international instruments:

- *(a)* International Covenant on Economic, Social and Cultural Rights, 1966.
- *(b)* International Covenant on Civil and Political Rights, 1966.
- *(c)* Optional Protocol to the International Covenant on Civil and Political Rights, 1966.
- *(d)* International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
- *(e)* Convention relating to the Status of Refugees, 1951.
- *(f)* Optional Protocol relating to the Status of Refugees, 1967.
- *(g)* Convention on the Political Rights of Women, 1952. [1953]
- *(h)* Convention on the Elimination of All Forms of Discrimination Against Women, 1979.
- *(i)* Protocol Amending the Convention on the Abolition of Slavery, 1925.
- *(j)* Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956.
- *(k)* International Covenant on the Civil and Political Rights of Women, 1953.
- *(l)* American Convention on Human Rights, 1969, taking note of its Articles 45 and 62.

12. Draw up and submit the necessary legislation to their competent domestic bodies in order to accelerate the process of modernizing and updating their legislation so that it may more effectively promote and ensure due respect for human rights.

13. Draw up and submit legislation to their competent domestic bodies in order to:

- *(a)* Guarantee the stability of the judiciary so that its members may act without political pressures and themselves guarantee the stability of lower-level officials.
- *(b)* Guarantee the budgetary stability of the judicial branch itself so that its independence from the other branches is absolute and unquestionable.

Section 4. Commitments relating to Electoral Processes and Parliamentary Cooperation

Each of the Parties recognizes the commitment of each of the other Central American States to its own people to guarantee the preservation of domestic peace as a contribution to the peace of the region, and to that end resolves to:

14. Take the appropriate measures to guarantee, under equal conditions, the participation of the political parties in the electoral processes, ensuring their access to the mass media and their freedom of assembly and speech.

15. They also undertake to:

- *(a)* Implement the following measures:
  - (1) Promulgate or amend electoral laws so that elections may be held that guarantee effective participation by the people.
  - (2) Establish independent electoral bodies that will prepare a reliable voting list and ensure that the process is impartial and democratic.
  - (3) Establish or, if appropriate, update rules that guarantee the existence

   and participation of political parties that are representative of the various opinion groups.
  (4) Establish a schedule of elections and take measures to ensure participation by political parties under equal conditions.

(b) Propose to their respective legislative bodies that they:

  (1) Hold regular meetings in alternating venues in order to exchange experiences, contribute to the reduction of tensions, and encourage a feeling of closeness among the countries in the area.
  (2) Take measures to establish relations with the Latin American Parliament and its working groups.
  (3) Exchange information and experiences in their field, and compile, for purposes of comparative study, the election laws and related provisions in force in each country.
  (4) Be present, as observers, at the various stages of the elections held in the region. For this purpose, an express invitation from the Central American country holding the election shall be required.
  (5) Hold periodic technical meetings at the location and with the agenda agreed upon by consensus at each preceding meeting. The procedures for convening the first meeting shall be determined by means of consultations among the Central American foreign ministries.

Chapter III. Commitments relating to Security Matters

In accordance with the obligations they have assumed under international law, the Parties undertake the following:

Section I. Commitments relating to Military Maneuvers

16. Comply with the following provisions when conducting military maneuvers:

(a) In the event that national or joint military maneuvers are being conducted in zones within a distance of thirty (30) kilometers from the border, the required prior notification referred to in Part II of this Act shall be given to the neighboring countries and to the Verification and Control Commission at least thirty (30) days in advance.
(b) The notification shall contain the following information:

  (1) Name
  (2) Purpose
  (3) Participating forces
  (4) Geographical location
  (5) Schedule
  (6) Equipment and weapons to be used.

(c) An invitation should be extended to observers from neighboring countries.

17. Prohibit international military maneuvers in their respective territories. Any such maneuver being conducted must be suspended within 30 days, at the latest, from the signature of this Act.

Section 2. Commitments relating to Arms

18. Stop the arms race in all its forms and initiate negotiations immediately on the control and reduction of current armaments inventory and military strength.

19. Refrain from introducing new weapons systems that may bring about qualitative or quantitative changes in current war material inventories.

20. Refrain from using chemical, biological, radiological and other types of weapons that may be considered excessively harmful or indiscriminate.

21. Submit its present weapons and manpower inventories to the Verification and Control Commission within 30 days from the date of signature of this Act. Inventories shall be prepared in conformity with the basic definitions and criteria contained in the Annex and Point 22 of this Section. Upon receipt of the inventories, the Commission shall conduct, within a period of 30 days at most, such technical studies as may be necessary to set the limits of military development in the States of the region, taking into account their national security interests, and to stop the arms race.

Based on the above, the Parties agree upon the following stages of implementation:

First Stage: Once they have submitted their respective inventories, the Parties shall refrain from acquiring any military equipment. This moratorium shall remain in effect until the limits referred to in the following stage have been agreed upon.

Second Stage: The Parties shall establish, within no more than 30 days, limits on the following types of weapons: combat aircraft and helicopters; tanks and armored vehicles; artillery; rockets and short-, medium-, and long-range guided missiles and launching means; ships, military vessels or vessels that could be used for military purposes.

Third Stage: At the conclusion of the previous stage, the Parties shall establish, within no more than 30 days, limits on military strength and on military installations that could be used in military actions.

Fourth Stage: The Parties may open negotiations on those matters whose discussion they consider to be vital.

Notwithstanding the above, the Parties may modify, by mutual agreement, the time periods established for negotiations and the setting of limits.

22. The following basic criteria shall determine the levels of military strength of the Central American States, in accordance with the stability and security needs of the region:

(*a*) No armed organization shall seek to establish a hegemony over other individual armed forces.

(*b*) The definition of national security shall take into account the level of economic and social development prevailing at a given time and the level that is sought.

(*c*) Formulation of the definition should be based on comprehensive studies of the following points:

   (1) Perception of the internal and external security requirements of the State
   (2) Area
   (3) Population
   (4) Distribution of economic resources, infrastructure and population within the national territory

(5) Length and features of land and maritime boundaries
(6) Ratio of military expenditures to the GDP
(7) Ratio of military budget to government expenditures and comparison with other social indicators
(8) Geographic features and situations and geopolitical conditions
(9) Highest level of military technology appropriate for the region.

23. Initiate the necessary constitutional procedures to sign and ratify or accede to international disarmament treaties and agreements, if they have not already done so.

Section 3. Commitments relating to Foreign Military Bases

24. Refrain from authorizing the establishment of foreign military bases or military schools in their territories.

25. Close existing foreign military bases or training schools in their territories within six months of the signature of this Act.

Section 4. Commitments relating to Foreign Military Advisers

26. Submit to the Verification and Control Commission a report on foreign military advisers and other foreign elements participating in military and security activities in their territories within 60 days of the signature of this Act. The definitions contained in the Annex shall be taken into account in the preparation of the report.

27. Establish a schedule for the gradual withdrawal of foreign military advisers and other foreign elements that would include the immediate withdrawal of military advisers located in operations and training areas. In establishing the schedule, the studies and recommendations of the Verification and Control Commission shall be taken into account.

28. With respect to advisers performing technical duties relating to the installation and maintenance of military equipment, a control list shall be established in conformity with the terms set forth in their contracts or agreements. The Verification and Control Commission shall use the control list for the purpose of setting reasonable limits on the number of such advisers.

Section 5. Commitments relating to Arms Traffic

29. Eliminate internal and external regional arms traffic supplying arms to persons, organizations, irregular forces or armed groups attempting to destabilize the governments of the Parties.

30. To that end, establish internal control mechanisms at airports, on land, air, sea and river routes, and at any other points or areas likely to be used for arms traffic.

31. Report presumed or proven arms traffic violations to the Verification and Control Commission, providing the Commission with sufficient information to enable it to conduct the necessary investigations and to present such findings and recommendations as it may consider appropriate. When applicable, the following criteria shall be used, *inter alia*, for verification purposes:

(*a*) origin of the arms traffic;
(*b*) personnel involved;
(*c*) type of armaments, ammunition, equipment or other categories of military supplies;

(*d*) extraregional means of transportation;
(*e*) extraregional transportation routes;
(*f*) storage facilities for weapons, ammunition, equipment and other types of military supplies;
(*g*) intraregional traffic areas and routes;
(*h*) international means of transportation;
(*i*) receiving unit.

SECTION 6. *Commitments relating to the Prohibition of Support for Irregular Forces*

32. Refrain from lending any political, military, financial or other support to individuals, groups, irregular forces or armed groups advocating the otherthrow or destabilization of other governments, and to prevent, using all means at their disposal, the use of their territory for attacks on or for organizing attacks, acts of sabotage, kidnappings, or criminal acts in the territory of another State.

33. Maintain strict vigilance along their borders to prevent their territory from being used for armed activities against a neighboring State.

34. Disarm and remove from border zones any group or irregular force identified as being responsible for acts against a neighboring State.

35. Dismantle and deny the use of logistical and operational support installations and facilities in their territories used to launch activities against neighboring governments.

SECTION 7. *Commitments relating to Terrorism, Subversion or Sabotage*

36. Refrain from lending political, military, financial or other support to subversive, terrorist or sabotage activities attempting to destabilize the governments of the region.

37. Refrain from organizing or urging participation in acts of terrorism, subversion or sabotage in another State or from permitting activities to be organized within their territories for the purpose of committing such acts.

38. Observe the following international treaties and agreements:

(*a*) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft.
(*b*) Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes Against Persons, and Related Extortion that are of International Significance.
(*c*) Convention for the Suppression of Unlawful Acts Against [the Safety of] Civil Aviation.
(*d*) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.
(*e*) International Convention Against the Taking of Hostages.

39. Initiate, if they have not already done so, constitutional procedures to sign and ratify or accede to the international treaties and agreements referred to in the preceding paragraph.

40. Respect the commitments enunciated in this section without prejudice to the execution of other treaties and international agreements on diplomatic and territorial asylum.

41. Prevent participation in criminal acts within their respective territories by persons belonging to foreign terrorist groups or organizations. To that end they shall strengthen cooperation among immigration and police authorities as well as among the appropriate civilian authorities.

Section 8. Commitments relating to Direct Communiction Systems

42. With a view to preventing incidents, establish a regional communications system ensuring immediate and timely contact between competent governmental and military authorities.

43. Establish joint security commissions in order to prevent or resolve conflicts between neighboring States.

Chapter IV. Commitments on Economic and Social Matters

Section 1. Commitments in the Economic and Social Fields

In order to strengthen the process of Central American economic integration and the institutions comprising and supporting it, the Parties agree to:

44. Reactivate, improve and restructure the process of Central American economic integration, bringing it into harmony with the various forms of political, economic and social organization of the countries of the area.

45. Ratify resolution No. 1/84 of the Thirtieth Meeting of Ministers responsible for Central American integration of July 27, 1984, directed towards the institutional reestablishment of the process of Central American integration.

46. Support and encourage the adoption of agreements for strengthening intra-Central American trade within the legal framework and in the spirit of integration.

47. Not to adopt or support coercive or discriminatory measures harmful to the economy of any Central American country.

48. Adopt measures for strengthening the financial organizations of the area, including the Central American Bank for Economic Integration, supporting its efforts to obtain resources and to diversify its operations, and preserving the decision-making power and the interests of all Central American countries.

49. Strengthen the multilateral payment mechanisms within the Central American Common Market Fund, and reactivate those mechanisms that operate through the Central American Clearing House. Available international financial assistance may be requested in support of these objectives.

50. Undertake sectoral cooperative projects in the area, such as the electrical energy production and distribution system, the regional food security system, the plan of priority health needs of Central America and Panama and others that would contribute to Central American economic integration.

51. Jointly examine the problem of Central American foreign debt on the basis of an evaluation that takes into account the internal situation of each country, its ability to pay, the critical economic situation in the area, and the flow of additional resources needed to further its economic and social development.

52. Support the process of developing and subsequently implementing a new Central-American tariff and customs régime.

53. Adopt joint measures to protect and promote their exports, integrating the processing, marketing and transportation of their products in so far as possible.

54. Adopt the necessary measures to accord juridical personality to the Central American Monetary Council.

55. Support at the highest level the efforts by CADESCA, jointly and in co-ordination with subregional bodies, to obtain from the international community the financial resources necessary for Central America's economic reactivation.

56. With the cooperation of the ILO, apply international labor standards and

conform their domestic legislation thereto, particularly in those areas which contribute to the reconstruction of Central American Societies and economics. Likewise, with ILO's cooperation, implement programs for creation of new jobs, training of workers and use of appropriate technologies aimed at better utilization of the labor force and natural resources of each country.

57. Request the Pan American Health Organization and UNICEF, as well as other development agencies and the international financial community to support the financing of the "Plan of Priority Health Needs of Central America and Panama" approved by the Ministers of Health of the Central American Isthmus meeting in San José, on March 16, 1984.

Section 2. Commitments on Refugee Matters

The Parties agree to make the necessary efforts to:

58. If they have not already done so, follow the constitutional procedures for acceding to the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees.

59. Adopt the terminology established in the Convention and Protocol referred to in the preceding paragraph in order to differentiate between refugees and other categories of emigrants.

60. Establish the necessary internal mechanisms for implementing the provisions of the Convention and Protocol referred to in paragraph 58, when accession takes place.

61. That consultative machinery be established between Central American countries and representatives of the government offices in charge of the refugee problem in each State.

62. Support the work of the United Nations High Commissioner for Refugees in Central America, and establish direct means of coordination in order to facilitate its efforts to carry out its mandate.

63. That any repatriation of refugees be voluntary, on the basis of expressed individual wishes, and undertaken with the cooperation of the UNHCR.

64. That tripartite commissions composed of representatives of the sending State, the receiving State and the UNHCR be set up in order to facilitate repatriation of refugees.

65. Strengthen programs of assistance and protection for refugees, especially in the fields of health, education, employment and security.

66. That programs and projects be set up with a view to permitting the refugees to achieve self-sufficiency.

67. That the UNHCR or other international agencies be asked to help to train officials in each country responsible for providing protection and assistance to refugees.

68. That the international community be asked to provide immediate assistance to Central American refugees, both directly, through bilateral or multilateral agreements and through the UNHCR and other agencies.

69. With the assistance of the UNHCR, identify other possible receiving countries for Central American refugees. In no case shall a refugee be transferred to a third country against his will.

70. That the governments of the area make the necessary efforts to eradicate the causes of the refugee problem.

71. That once the bases for voluntary or individual repatriation have been agreed, with full guarantees for the refugees, the receiving countries allow official

delegations from the sending countries, accompanied by representatives of the UNHCR and the receiving country, to visit the refugee camps.

72. That receiving countries, in coordination with the UNHCR, facilitate the arrangements for the exit of refugees in cases of voluntary and individual repatriation.

73. Establish control measures in countries granting refuge in order to prevent refugees from participating in activities against the sending country, always with due respect for the human rights of refugees.

PART II. COMMITMENTS RELATING TO IMPLEMENTATION

The Parties shall establish the following mechanisms for the implementation of the commitments contained in this Act:

1. *Comite ad hoc para la Evaluacion y el Seguimiento de los Compromisos en Materia Politica y de Refugiados* [*Ad Hoc* Committee for the Evaluation and Implementation of Commitments in Political and Refugee Matters].

(*a*) Membership

The Committee shall be composed of five (5) prominent persons of recognized competence and impartiality, nominated by the States members of the Contadora Group and approved by the Parties by mutual agreement. The members of the Committee shall be nationals of States other than the Parties.

(*b*) Duties

The Committee shall receive and evaluate the reports that the Parties undertake to furnish concerning the manner in which they have proceeded to implement their commitments in the area of national reconciliation, human rights and the electoral and refugee process.

> Moreover, the Committee shall be open to papers on these topics sent to it for information by organizations or individuals, which may contribute useful information to the evaluation.
>
> Using the preceding information, the Committee shall periodically prepare a report which, in addition to containing the evaluation, shall include proposals and recommendations for improved implementation of the commitments. This report shall be sent to the Parties and to the governments of the Contadora Group.

(*c*) Bylaws

The Committee shall draw up its own bylaws and shall inform the Parties of them.

2. Verification and Control Commission on Security Matters.

(*a*) Membership

The Commission shall be composed of the following:

> Four commissioners representing States recognized to be impartial and to have a genuine interest in contributing to the solution of the Central American crisis. They shall be nominated by the Contadora Group and approved by the Parties entitled to speak and to vote on the decisions of the Commission. Coordination of the work of the Commission shall be rotated.

A Latin American Executive Secretary appointed by the Contadora Group in agreement with the Parties entitled to speak and to vote on the decisions of the Commission. The Executive Secretary shall be responsible for the permanent operation of the Commission.

A representative of the United Nations Secretary-General and a representative of the OAS Secretary General, acting as observers.

(b) Establishment

The Commission shall be established at the latest within thirty (30) days from the signature of this Act.

(c) Duties

Receive the current arms, installations and manpower inventories from the Parties, prepared in accordance with the provisions of the Annex.

Conduct technical studies to be used in establishing maximum military strength limits for the Parties of the region in accordance with the basic criteria established in Commitment 22 of this Act.

Verify that no new arms are introduced that may qualitatively or quantitatively change present inventories and that no weapons banned by this Act are utilized.

Establish a register of all commercial transfers of arms by the Parties, including donations and other transactions arranged under military assistance agreements with other governments.

Verify the dismantling of foreign military installations as established in this Act.

Receive the roster of foreign military advisers and verify their withdrawal according to the agreed timetable.

Verify compliance with this Act concerning trafficking in arms and examine any reports of violations. To this end the following criteria should be considered:

(1) Origin of the trafficking in arms: This concept includes the port or airport of embarkation of the arms, munitions, equipment and other categories of military supplies intended for the Central American region.

(2) Persons involved: Persons, groups or organizations that have participated in the coordination and the commission of trafficking in arms, including participation by the government or its representatives.

(3) Type of arms, munitions, equipment and other categories of military supplies: Under this heading indicate the type of arms, caliber and country of manufacture, if the country of origin is not the same as the country of manufacture, and the number of each type of arms, munitions, equipment and other categories of military supplies.

(4) Means of transportation outside the region: Note the means of transportation by land, sea or air, including nationality.

(5) Extraregional transportation routes: Indicate what traffic routes were used before reaching Central American territory, including ports of call or intermediate destinations.

(6) Bases for storing arms, munitions, equipment and other types of military supplies.

(7) Intraregional traffic areas and routes: Describe the areas and routes and the participation or consent of the government or governmental and political sectors in arms trafficking. State how frequently these areas and routes are used.

(8) International means of transportation: Indicate the means of transportation used, their owners and the facilities provided by the government or governmental and political sectors, specifying whether they include clandestine flights to unload military equipment, dropping packages with parachutes, and using small launches loaded with supplies on the high seas.

(9) Recipient(s): Determine the persons, groups and organizations who are the recipients of the arms traffic:

- Verify compliance with this Act concerning irregular forces and non use of their own territories for destabilizing activities against any other State and examine any reports of violations.
- Verify compliance with the notification procedures for national or joint military maneuvers stipulated in this Act.

(d) Rules and Procedures

- The Commission shall receive any report of violations of the commitments relating to security undertaken in this Act, provided that it is duly founded. It shall inform the Parties involved of the report and shall initiate whatever investigations it deems appropriate..
- The Commission shall conduct its investigations through onsite inspection, compiling evidence, and any other procedure it considers necessary for the performance of its functions.
- In the event of a report of violation or nonfulfillment of the commitments of this Act relating to security, the Commission shall prepare a report containing recommendations for the Parties involved.
- The Commission shall send all its reports to the Central American Ministers of Foreign Relations.
- The Commission shall have access to all the facilities and receive the prompt and full cooperation of the Parties in the proper performance of its functions. It shall also ensure the confidentiality of any information collected or received during its investigations.

(e) Bylaws

Once established, the Commission shall draw up its own bylaws and shall inform the Parties of them.

3. *Comite ad hoc para la Evaluacion y el Seguimiento de los Compromisos en Materia Economica y Social* [*Ad Hoc* Committee for the Evaluation and Implementation of Commitments in Economic and Social Affairs]

(a) Membership

For the purposes of this Act, the meeting of ministers responsible for Central American economic integration shall constitute the *Ad Hoc* Committee for the Evaluation and Implementation of Commitments in Economic and Social Affairs.

(b) Functions

- The Committee shall receive the reports by the Parties concerning their progress in complying with the economic and social commitments.
- Conduct periodic evaluation of advances in compliance with economic and social commitments, relying on the information furnished by the Parties and the competent international and regional organizations.

The Committee shall present proposals in its periodic reports to strengthen regional cooperation and promote development plans, with particular emphasis on the aspects indicated in the commitments of this Act.

PART III. FINAL PROVISIONS

1. The commitments undertaken by the Parties in this Act shall be legal in nature and, therefore, binding.

2. This Act shall be ratified in conformity with the constitutional procedures established in each of the Central American States. The instruments of ratification shall be deposited with the governments of the States which compose the Contadora Group.

3. This Act shall enter into force when the five Central American signatory States have deposited their instruments of ratification.

4. The Parties, after the date of signature, shall abstain from acts designed to frustrate the purpose of this Act.

5. The mechanisms referred to in Part II shall become provisionally operational 30 days after the date of signature of this Act. The Parties shall take the necessary steps before the end of that period to ensure the aforesaid provisional operation.

6. Any dispute regarding the interpretation or application of this Act that cannot be resolved through the mechanisms provided in Part II shall be submitted to the Ministers for Foreign Relations of the Parties for their consideration and decision; the affirmative vote of all Parties shall be required for a decision.

7. In the event that the dispute persists, it shall be submitted to the Contadora Group Foreign Ministers, who shall meet at the request of any of the Parties.

8. The Ministers for Foreign Relations of the States composing the Contadora Group shall use their good offices so that the Parties concerned may resolve the specific situation submitted for their consideration. If that recourse fails, they may suggest another peaceful means of resolving the dispute in conformity with Article 33 of the United Nations Charter and Article 24 of the Charter of the Organization of American States.

9. There shall be no reservations to this Act.

10. This Act shall be registered by the Parties with the Secretary-General of the United Nations and the Secretary General of the Organization of American States in conformity with Article 102 of the United Nations Charter and Article 118 of the Charter of the Organization of American States.

Done in the Spanish language, in 9 originals, in the city of ,
on , 1984.

Annex

The Parties agree on the following definitions of military terms:

1. Registry: Numerical or graphic data of military, paramilitary and security forces and military installations.

2. Inventory: Detailed list of weapons and military equipment, of national or foreign ownership, including as many specifications as possible.

3. Census: Numbers of foreign military or civilian personnel assigned as advisers on defense and/or security.

4. Military installation: Facility or infrastructure that includes airports, barracks, forts, camps, air or naval facilities or similar facilities under military jurisdiction, including their geographical location.

5. Organization and equipment plan: Document showing the mission, organization, equipment, capacity and limitations of a typical military unit at its various levels.

6. Military equipment: Matériel, individually or assembled, of national or foreign ownership, used by a military force in its day-to-day activities and operations, excluding weapons.

7. Classification of weapons:

(*a*) By their nature:

- 1. Conventional
- 2. Chemical
- 3. Biological
- 4. Radiological

(*b*) By their range:

- 1. Short-range: Individual and collective portable weapons.
- 2. Medium-range: Non-portable support weapons (mortars, howitzers and artillery)
- 3. Long-range: Rockets and guided missiles, classified in turn as:
  - (*a*) Short-range rockets: maximum range of less than twenty (20) kilometers
  - (*b*) Long-range rockets: range of twenty or more kilometers
  - (*c*) Short-range guided missile: maximum range up to one hundred (100) kilometers
  - (*d*) Medium-range guided missile: range between one hundred (100) to less than five hundred (500) kilometers

(*c*) By their caliber and weight:

- 1. Light: 120 mm or less
- 2. Medium: more than 120 mm and less than 160 mm
- 3. Heavy: more than 160 mm and less than 210 mm
- 4. Very heavy: more than 210 mm

(*d*) By their trajectory:

- 1. Straight-line fire weapons
- 2. Curved or arced line of fire
  - (*a*) mortars
  - (*b*) howitzers
  - (*c*) cannon
  - (*d*) rockets

(*e*) By their means of transport:

- 1. hand-carried
- 2. horse-drawn
- 3. towed or on threads
- 4. self-propelled
- 5. all weapons may be transported by road, railroad, sea or air
- 6. transportation by air is classified as:
  - (*a*) by helicopter
  - (*b*) by plane.

8. Characteristics to be considered regarding the various types of planes and helicopters:

(*a*) Model
(*b*) Quantity
(*c*) Crew
(*d*) Manufacture or make
(*e*) Speed
(*f*) Capacity
(*g*) Propelling system
(*h*) Armed or not
(*i*) Type of armament
(*j*) Radius of action
(*k*) Navigation system
(*l*) Communications system
(*m*) Type of mission it accomplishes.

9. Characteristics to be considered regarding various ships or boats:

(*a*) Type of ship
(*b*) Shipyard and year built
(*c*) Tonnage
(*d*) Displacement capacity
(*e*) Draft
(*f*) Length
(*g*) Propelling system
(*h*) Type of armament and firing system
(*i*) Crew

10. Services: Organizations providing general support, logistical and administrative support to military, paramilitary and security forces.

11. Military training centers: Facilities used for the training and preparation of military personnel at their various levels and specialties.

12. Military base: land, sea and air space which includes military installations, personnel and equipment under military command. The definition of a foreign military base must take into account the following factors:

Administration and control
Sources of financing
Ratio of local to foreign personnel
Bilateral agreements
Location and geographical area
Leasing or ceding of territory to another State
Number of military personnel.

13. Foreign military installations: Facilities built for the purpose of being used by foreign units for maneuvers, training or other military objectives according to bilateral conventions or agreements. These facilities may be temporary or permanent.

14. Foreign military advisers: Military and security advisers are understood to include military or civilian foreign personnel on technical training or advisory missions in the following areas of operations: tactical, logistics, strategy, organization and security with land, sea and air forces or security forces in the Central American States under agreements subscribed to by one or various governments.

15. Arms traffic: Arms traffic is understood to include all types of transfer by regional or extraregional governments, persons or groups, of weapons intended

for non-regular groups or forces or armed bands that seek to destabilize governments in the region. This also includes the passage of such traffic through a third State, with or without its consent, intended for the above-mentioned groups in another State.

16. National military maneuvers: Combat or war exercises or simulations carried out by military forces in peacetime for their training. These are carried out by the armed forces of the country in their own territory and may include land, sea and air units, for the purpose of increasing their operating effectiveness.

17. International military maneuvers: All operations carried out by the military forces of two or more countries in the territory of one of them or in an international area, including land, sea and air units, for the purpose of increasing their operational effectiveness and developing joint coordinating measures.

18. Inventories made in each State for each of its armed forces, taking into account the number of personnel, weapons and munitions, equipment and installations of the forces indicated below and in accordance with their own patterns of organization.

(*a*) Security forces:

1. Border guards
2. Urban and rural guards
3. Military forces assigned to other ministries
4. Public safety forces
5. Training centers
6. Other

(*b*) Naval forces:

1. Location
2. Type of base
3. Number and characteristics of the fleet: types of weapons
4. Defense systems: types of weapons
5. Communications systems
6. War materiel services
7. Ground or air transport services
8. Health services
9. Maintenance services
10. Supply services
11. Recruiting and active duty
12. Training centers
13. Other

(*c*) Air forces:

1. Location
2. Runway capacity
3. Number and characteristics of the air fleet: types of weapons
4. Defense systems: types of weapons
5. Communications systems
6. War materiel services
7. Health services
8. Ground transportation services
9. Training centers
10. Maintenance services
11. Supply services
12. Recruitment and active duty
13. Other

(*d*) Land forces:

1. Infantry
2. Motorized infantry
3. Airborne infantry
4. Cavalry
5. Artillery
6. Armor
7. Communications
8. Engineers
9. Special forces
10. Reconnaissance forces
11. Health services
12. Transportation services
13. War materiel services
14. Maintenance services
15. Quartermaster
16. Military police
17. Training centers
18. This document must include precise information on the system used for induction, and recruitment and active duty
19. Other

(*e*) Paramilitary forces:
[No listing follows]

(*f*) Information requirements for existing airports and airfields:

1. Detailed location and category
2. Location of facilities
3. Dimensions of the take off, taxiing and maintenance strips
4. Buildings, maintenance facilities, fueling installations, navigational aids and communications systems

(*g*) Information requirements for terminals (docks) and ports:

1. Location and general characteristics
2. Entrance and access channels
3. Breakwaters
4. Capacity of the terminal (docks).

(*h*) Personnel: Personnel is required to serve in the security forces and paramilitary organizations; information on advisers must include the number, immigration status, specialty, nationality and duration of stay in the country, as well as any applicable agreements or contracts.

(*i*) Regarding armaments, all types of munitions must be included: explosives, ammunition for light weapons, artillery, bombs and torpedoes, rockets, hand and rifle grenades, depth charges, land and sea mines, fuses, grenades for mortars and howitzers, etc.

(*j*) In the national and foreign military installations, include military hospitals and first aid stations, naval bases, airports and landing strips

ADDITIONAL PROTOCOL TO THE CONTADORA ACT FOR PEACE AND COOPERATION IN CENTRAL AMERICA

The undersigned plenipotentiaries, vested with full powers by their respective governments;

Convinced that the full cooperation of the international community is needed to ensure the implementation, effectiveness and viability of the Contadora Act for Peace and Cooperation in Central America adopted by the countries of the region:

Have agreed as follows:

1. To abstain from any action which may thwart the purpose and objective of the Act.
2. To cooperate with the Central American States on the terms in which those States jointly request such cooperation in furtherance of the aims of the Act.
3. To give their full support to the Verification and Control Commission in the performance of its duties, when the Parties so require.
4. This Protocol shall be open for signature by all States wishing to contribute to peace and cooperation in Central America. It may be signed before any of the depositary governments of the Act.
5. This Protocol shall enter into force for each signatory State on the date of its signature by such State.
6. This Protocol shall be deposited with the governments of the member States of the Contadora Group.
7. This Protocol does not admit reservations.
8. This Protocol shall be registered with the General Secretariat of the United Nations in accordance with Article 102 of the United Nations Charter.

Done in the Spanish language, in four original copies, in the city of , on the day of of 1984.

For the Government of Colombia For the Government of Mexico

For the Government of Venezuela For the Government of Panama

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2. Joint Communique of the Ministerial Meeting of San Jose, Costa Rica, 29 September 1984, as Contained in Cable San Jose 7633

JOINT COMMUNIQUE OF THE MINISTERIAL MEETING OF SAN JOSE, COSTA RICA

1. A conference of Foreign Ministers was held in the City of San Jose, Costa Rica, on 28/29 September 1984 between the European Community and its Member States, Portugal and Spain, the States of Central America and the Contadora States.

2. The Conference was attended by (lists EC, Contadora, Central American, Portuguese and Spanish Foreign Ministers).

3. Inspired by a consciousness of their shared cultural heritage and of their common attachment to the ideals and values enshrined in the United Nations Charter, the participating countries have inaugurated through this conference a new structure of political and economic dialogue between Europe and Central America. They are convinced that this dialogue, and the increased practical co-operation that it will engender, will reinforce the efforts of the countries of Central America themselves, with the support of the Contadora States, to bring an end to violence and instability in Central America and to promote social justice, economic development and respect for human rights and democratic liberties in that region.

4. A comprehensive discussion took place between the Ministers of the Ten Member States of the European Community and those of the Central American countries on the political, economic and cultural relations between them and agreements were reached on the future development of those relations. They have agreed that further meetings in this dialogue should take place at regular intervals. The level of such meetings, whether at ministerial or official level, will be determined in the light of circumstances. The Foreign Ministers of Spain and Portugal associated themselves with these agreements.

5. The Foreign Ministers exchanged views on current regional and international problems and developments, and in particular the situation in Central America. They expressed their preoccupation at the conditions and acts which gravely disturb the peace and security of the Central American region, and agreed on the necessity for the governments of the area to intensify negotiations which lead to mutual understanding and permanent stability.

6. The Ministers reaffirmed their commitment to the objectives of peace, democracy, security and economic and social development, and political stability in Central America and were united in the view that the problems of that region cannot be solved by armed force, but only by political solutions springing from the region itself. In this conviction they affirmed their support for the pacification measures which are being developed in the Contadora process. They expressed their conviction that this process represents a genuinely regional initiative and the best opportunity to achieve a solution to the crisis through political undertakings aimed at the achievement of the aims set out in the "Document of Objectives" approved by all the governments of the region on 9 September 1983. They noted with satisfaction the progress achieved so far towards such a solution, and that the elaboration of the revised draft Contadora Act for Peace and Cooperation in Central America is a fundamental stage in the negotiating process for the attainment of peace in the region. They called on the States concerned

to continue to make every effort to bring the Contadora process rapidly to final fruition through the signature of a comprehensive agreement which would bring peace to the region. They were agreed on the necessity for a practical commitment to the implementation of any such agreement by all the States in the region and all other countries which have interests there, and on the necessity for the verification and control of that implementation.

7. The European countries expressed their willingness to support, within their capabilities and if requested, the efforts of those States to which it falls to implement the provisions of any agreement.

8. The Ministers discussed the international economic situation and, in particular, economic and trade relations and cooperation between the European Community and Central America.

9. The Ministers agreed that the current international economic situation should be regarded as particularly difficult. In this context, they underlined the problems concerning the external indebtedness of the developing countries and the wider economic, trade and social implications of continued indebtedness for those countries. Within this framework, the Central American Ministers stressed that in present circumstances debt servicing by the countries of Central America is even more burdensome given increased interest rates and deteriorating prices for those products which make up the bulk of their exports. The Community Ministers and those of Portugal and Spain declared themselves ready to assist the countries of Central America, in the appropriate framework, in the pursuit of policies aimed at solving these problems.

10. The Ministers expressed their determination to cooperate in the appropriate international fora with a view to improving the present international economic situation.

11. An effective manner of contributing to the reduction of political tension in Central America would be to support the actions intended to preserve the degree of economic interdependence existing between the countries of the region.

The Community Ministers recognized that the Central American region has a definite development potential through the process of integration and reaffirmed their willingness to support this through the further development of relations between the two regions.

In this connection, the Ministers looked forward to the accession of Portugal and Spain to the European Community and welcomed the contribution which they will make to the further strengthening of cooperation between the two regions.

12. The European Ministers and those of the Central American Isthmus declared themselves satisfied with the results already produced by their relations and agreed on the need to broaden and deepen these relations. They concentrated more particularly on the areas in which cooperation with the European Community has proved useful for the economic development of the group of Central American countries and where mutual cooperation should be strengthened (specific development projects, particularly agricultural and rural projects with a regional basis, regional integration, trade promotion and generalized preferences).

13. The European and Central American Ministers, in looking ahead to the future, in the perspective of the development of mutual cooperation, recognized the existence of solid ground for cooperation activities, on the basis of equity, respect and mutual benefit, notably along the lines of the following paragraphs.

14. The Community and the group of Central American countries recognized the need to develop, extend and diversify their mutual trade to the fullest possible extent. In this connection the Ministers considered that the generalized system of preferences could be an appropriate means to encourage the growth of foreign

trade and industrialization of the countries concerned. They agreed that the use of the system should be simplified and its benefits be extended.

The Community reaffirmed the importance it attaches to the fundamental objectives of the generalized preferences system and announced its intention, where the development and the application of the system is concerned, of taking into account the interest that will be shown by the Central American countries.

15. Taking account of the importance of economic development for the countries of the Central American region, the Community will do everything possible, within the context of its present and future programmes in support of developing countries, towards the development of the region. These actions should be identified by common agreement, based on the priorities and objectives of the region and should be multilateral in character. The Community declared itself willing to exploit to the full the institutional infrastructure existing in the region.

In addition to aid given on a bilateral basis by Member States of the Community to the countries of the region, the Community will provide technical and financial assistance to Central America, in particular for agricultural, agro-industrial and rural projects. With the aim of promoting regional economic integration and the development of intra-regional trade, it is the intention of the Community to give priority assistance to projects of a regional nature and to help the countries of Central America and their regional institutions through sharing with them the Community's specific experience acquired in matters of integration.

For its part, the group of Central American countries declared itself ready to present specific projects in priority fields, which take into account *inter alia* social welfare aspects.

By way of illustration, mention was made, with regard to projects, of the demands which were presented jointly by the countries of Central America to the international financial community in Brussels in September 1983.

The Central American Ministers emphasized the importance they attach to the reactivation of production and particularly of the production of goods traded within the Central American Isthmus. For the purpose of the latter, financial support is required for the countries of the Central American Isthmus, preferably through the Banco Centroamericano de Integracion Economica (CABEI), so that the support will contribute to the reactivation of the industrial and agricultural sectors of the region.

It is the intention of the Community and of its Member States to give priority to the development of their assistance to regionally-oriented projects and to those of a social nature such as health programmes and those intended to relieve the situation of those who for one reason or another have been compelled to abandon their traditional homes.

16. The Ministers on the two sides considered that economic cooperation represented an area of interest for future relations between the Community and the group of Central American countries. In this context, they mentioned specifically the promotion of business contacts between the two regional groupings, cooperation between public and private national financing instruments in the two regions, as well as scientific, technical and basic training, especially in research fields. The Community Ministers took note of the possibility offered by the CABEI Board of Governors to open its membership to countries outside the region. In view of the important role assumed by foreign investments in the economic development of Central American countries, the Ministers agreed that the promotion and protection of European investments in Central America are in their mutual interest. In this connection, they stressed the need for an improved

climate for investments in the region by appropriate measures of encouraging private investments.

17. The Ministers of the European Community and those of Central America acknowledged the interest in strengthening and giving institutional form to their mutual relations. Acknowledging the importance of strengthening relations, they declared themselves ready to start discussions as soon as possible with a view to negotiating an inter-regional framework cooperation agreement. On the Community side, the agreement would be negotiated in accordance with its established procedures. Both sides considered that the conclusion of an agreement of this type would confirm the political will of both regions to extend and develop their relations and that it would also help to reinforce relations between the Community and Latin America as a whole.

18. The Central American Ministers expressed the view that the appropriate intergovernmental forum for approving the main lines of a regional position as a mechanism for negotiation and follow-up in the economic sphere is the Central American Economic Council, with the participation of a representative from the Government of Panama.

The negotiating body, under the aegis of the Central American Economic Council, will be an *ad hoc* group composed of delegates from every government. This body will act in coordination with the group of heads of mission of the countries of the Central American Isthmus (GRUCA), with headquarters in Brussels. The SIECA will support the mechanism for negotiation and follow-up and will seek the collaboration of other institutions connected with Central American integration and other regional and international bodies in accordance with the circumstances.

19. The Ministers expressed their conviction that this meeting constitutes a first step in a process which will effectively increase existing cooperation between Central America and Europe.

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3. "Exposicion del Senor Ministro de Relaciones Exteriores al Honorable Congreso Nacional pidiendo la aprobacion de la Carta de las Naciones Unidas, el Estatuto de la Corte Internacional de Justicia y los Acuerdos Provisionales Concertados por los Gobiernos Participantes en la Conferencia de las Naciones Unidas sobre Organizacion Internacional (Managua, D.N., 2 de Julio de 1945)", in Republica de Nicaragua, *Memoria Presentada al Honorable Congreso Nacional Por el Secretario de Estado en el Despacho de Relaciones Exteriores, 1945* ("Statement of the Minister of Foreign Relations to the National Congress requesting the Approval of the United Nations Charter, the Statute of the International Court of Justice, and the Provisional Agreements Concluded by the Governments Participating in the United Nations Conference on International Organization" (Managua, 2 July 1945) in Republic of Nicaragua, *Memorial Presented to the National Congress by the Secretary of State in the Office of Foreign Relations, 1945*) (English Translation of pages 139-142 Provided)

[Spanish text not reproduced]

DEPARTMENT OF STATE, DIVISION OF LANGUAGE SERVICES

(Translation)

LS No. 113935
WD/MM
Spanish

REPUBLIC OF NICARAGUA MEMORIAL PRESENTED TO THE NATIONAL CONGRESS BY THE SECRETARY OF STATE IN THE OFFICE OF FOREIGN RELATIONS

Dr. Victor Manuel Roman y Reyes

Managua, 1945

Statement of the Minister of Foreign Relations to the National Congress requesting the Approval of the United Nations Charter, the Statute of the International Court of Justice, and the Provisional Agreements Concluded by the Governments Participating in the United Nations Conference on International Organization

Managua, July 2, 1945.

Gentlemen:

On the express instructions of the President of the Republic, I have the honor to submit for consideration by the National Congress, through you the Secretaries of that body, the United Nations Charter, the Statute of the International Court of Justice — which is annexed to the former as an integral part thereof — and the Provisional Agreements drawn up by the governments participating in the United Nations Conference on International Organization, in which is established a Preparatory Commission of the United Nations charged with taking all necessary measures during the process of ratification and entry into force of the aforesaid Charter and Statute.

Given the importance and hoped-for results of the international accords which I am submitting to you, the President of the Republic desires that they be considered with all appropriate urgency. In the United States of America, President Truman personally recommended them to the Senate and asked for their swift ratification.

I shall be very brief in my statement about those clear, precise and well-known documents, which we signed without reservations at San Francisco, city of peace, confident that they close a cycle of injustice and suffering and open the way to a future in which human endeavor will follow new paths of conciliation and well-being.

The first of those documents, the United Nations Charter, finds its source and inspiration in the so-called Dumbarton Oaks proposals, drawn up by that great apostle of democracy Franklin Delano Roosevelt and the great statesmen Winston Churchill and Joseph Stalin, and in the additional Yalta agreements.

It was far from easy to arrive at an agreement amidst the multitude of opinions and interests encountered. Much good will was required to hammer out the understanding that was reached, as was the firm conviction that peace is the greatest good and any sacrifice made to keep it is worthwhile.

The fact that a formula reconciling all interests and opinions was achieved should strengthen our confidence that all differences can be resolved and all conflicts settled. We ought to nurture that conviction because it inspires the certainty that where there is a will to prevent war there is always a way.

The preparation of the United Nations Charter involved the participation of representatives of 50 nations, of different races, languages, religions and cultures, united by their determination to find a means of putting an end to wars.

The Charter is not a perfect instrument, as no human endeavor can be perfect. What nobody will deny is that it represents a step forward and a considerable advance towards the betterment of humanity and acknowledgement of the fundamental rights of men and nations. As President Truman said in his speech at the closing session of the San Francisco Conference, it is a solid structure on which to build a better world.

Nor can the Charter be considered capable, as a single isolated document, of bringing forth conciliation and harmony among nations. In my remarks to the Conference I called for an instrument designed to thwart aggression and eliminate justification for war through the collaboration of nations. Now we have that instrument, but the collaboration of nations will always be necessary.

The same unity, the same firm purpose, the same faith in peace as the best climate for understanding among peoples, are and will remain indispensable to maintain international harmony and the well-being of humanity. The eloquent French statesman Paul Boncour made the memorable comment at one point in the Conference that peace "depends on true unity of purpose among the large and small countries. In this hour of immense hope filling our hearts, let us swear to keep our faith in peace, in the unity that was our strength during the war."

Although I shall not embark on a detailed and comprehensive discussion of the Charter, with whose contents and scope this distinguished assembly is surely familiar, I do wish to mention two particular passages in it. One of them, specific in character, is relevant to our continental organization and its peace-loving traditions as embodied in our Hemispheric international law, while the other, general in character, addresses the needs and wishes of all the world's people.

The representatives of the countries of the Americas sought to include in the

Charter our entire international legal heritage as it is enshrined in treaties, conventions and other agreements, and as it lives and pulses in the consciousness of the New World. The diversity of traditions and perspectives prevented the realization of this Hemispheric ideal; nevertheless, the effort did result in recognition of the existence of regional arrangements and agencies, as reflected in the reference in Chapter VIII on Regional Arrangements to

> "such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations".

Economic and social problems are considered in the Charter, and, inasmuch as their precedence over merely political ones is acknowledged, an Economic and Social Council is created and international cooperation is regulated with a view to solving them.

At both the Chapultepec and San Francisco Conferences, the Delegation of Nicaragua advocated the organization of a comprehensive peace that must be capable of bringing about the collective well-being of nations if it is to be not just a truce between conflicts but a permanent condition in which all men can live on this earth, free from fear and poverty. It was our view then as now that suffering and unmet needs can never be a propitious environment for a life of concord and harmony. As a famous orator remarked, war must be prevented not only by force but also by the achievement of social peace among peoples.

To conclude, I must refer to the Statute of the International Court of Justice which is based on the draft prepared in Washington by an international committee of jurists.

In the work of the Conference, the Latin American countries, in keeping with their advanced international law, took a stand in favor of the binding jurisdiction of the Court in the settlement of international disputes. They had to bow to the thesis of voluntary jurisdiction which prevails on the other continents, and consequently States were left free to decide whether they wanted to submit their disputes to the international legal organization that was created. However, the Charter left intact the right of States to subject themselves to the jurisdiction of the Court pursuant to earlier agreements or by virtue of future arrangements.

Such are the main outlines of the important documents which I hereby submit to you as the best security machinery it has proved humanly possible to devise against the horrors of war.

I avail myself of this opportunity to renew to you, Gentlemen, the assurances of my highest consideration.

(*Signed*) Mariano ARGUELLO.

4. Letter from Manley O. Hudson, Harvard University, Cambridge, Massachusetts, to Esteban Mendoza, Minister of Foreign Relations, Honduras, dated 14 November 1955

14 November 1955.

My dear Mr. Secretary:

1. Some days have elapsed since I received your kind letter offering me the hospitality of the City of Tegucigalpa during my stay. You were most kind in saying that you would take care of my friends.

2. I regret to say that it will be impossible for me to come as soon as the 14th of December 1955. Can't you and Mr. Dávila come here in December, and go over the situation with me?

3. I think it is not too much to say that I have worn myself sick, thinking about this question of jurisdiction. I went to Geneva in the summer, and conferred at length with the officials of the United Nations and the officials of the International Court of Justice. The trip was very rewarding, in that I could discover all the facts which were in Geneva. I discovered several facts that were new.

4. It would take little of your time to come to Cambridge, and you would be doing a big thing for Honduras. I would suggest that you and Mr. Dávila try to spend the week of 5 December 1955, or of 12 December 1955, here.

5. In the hope that you can do this, I have prepared a rough sheet, which I shall propose as the subject of our discussion. You and Mr. Dávila can master what is in this sheet, and we could then discuss it. I hope very much that you can come.

6. I also have in mind definite answers to your questions, which I shall give at a later date. Some of them are on pretty slim ground, but I shall deal with all of them.

7. If you cannot come, I shall try to be on hand in Honduras by the latter part of January 1956.

With the pleasantest of greetings, I am

Very sincerely yours,

(*Signed*) Manley O. Hudson.

5. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 16 DECEMBER 1955 WITH ATTACHED AIDE-MÉMOIRE

16 December 1955.

Dear Mr. Minister,

With great glory to you, I send you the revised copy of the Aide-Mémoire.

Warmly yours,

Manley O. HUDSON.

Signed for Judge Hudson in his absence, Laurence A. BROWN, Jr.

AIDE-MÉMOIRE

(1) In May 1955, the Government of the United States of America instructed the Ambassador of the United States in Honduras, and the Ambassador of the United States in Nicaragua, to make a suggestion to the respective Governments to which they were accredited that the best way to prevent friction between the two countries over the question of the boundary between Honduras and Nicaragua, would be for them to go to the International Court. This action by the Government of the United States followed the action which was taken by the Government of Honduras in April 1955 in order to expel from Honduran territory a detachment of Nicaraguan troops.

(2) The Honduras Government advised the Government of the United States through its Ambassador in Washington that it was thoroughly in accord with the principle embodied in the foregoing proposition.

(3) So far as we know, the Nicaraguan Government has not made a similar statement.

(4) The statement made to the Secretary-General of the League of Nations on November 29, 1939, was that Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, and that the instrument of ratification would follow. The instrument of ratification of Nicaragua has not been found. Of course, the instrument of ratification of the Statute, which Nicaragua had signed on September 14, 1929, would have had the effect of bringing into force the declaration of September 24, 1929, by which Nicaragua "recognized as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice".

(5) Since the United States Government has shown very much interest in this question, inasmuch as it represents the maintenance of peace and security in this hemisphere, the Honduras Government respectfully requests that the Government of the United States ask the Nicaragua authorities what was meant by the action of November 29, 1939.

6. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 20 DECEMBER 1955 (WITHOUT ATTACHMENT)

December 20, 1955.

Dear Mr. Minister:

I enclose herewith the Opinion concluded. It is not as we would have wished it — you and I! Yet I cannot see any escape from the conclusions that are reached in this Opinion.

I very much regret that we have not reached other conclusions. I shall long think of you and Dr. Dávila, and shall as long remember your many kindnesses to me and your constant backing of me. It is a great thing that I will remember.

Faithfully yours,

(*Signed*) Manley O. HUDSON.

7. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 16 JANUARY 1956

16 January 1956.

My dear Mr. Minister:

(1) I have received your letter of 4 January, which pays attention to the work we have done.

(2) I very much regret that Nicaragua has not ratified the Statute of the Permanent Court of International Justice in 1929. It is a bad thing from our point of view.

(3) I think your conversation with Mr. Holland did a great deal of good, and I very much await the result. I note that Mr. Holland will advise Nicaragua to accept the jurisdiction of the Court, but I think that it is almost hopeless.

(4) In your last paragraph, you refer to my continuing "to render us the assistance of your experience and knowledge". I should be only too happy to do this, and I am constantly on the alert for anything which you may need me to do.

(5) At the present time, I am at work, as you directed when you were in my office, on the statement of the Honduran case before the Court. I think a good case can be made for it, and I think that we can use it somehow. In any event, I think the job should be done.

With assurances of my great esteem, I am
Sincerely yours,

(*Signed*) Manley O. HUDSON.

8. Letter from Esteban Mendoza to Manley O. Hudson of 10 February 1956 (Spanish with English Translation of 11 February 1956)

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., February 11, 1956.

Excellency:

I have the honor to acknowledge receipt of your letter dated January 18, 1956, which has remained unanswered due to my temporary absence from the country.

I have been authorised by the President of the Republic to accept your very important professional services in drafting the demand to be filed by Honduras before the International Court of Justice against Nicaragua, on our boundary question.

……

Up to this moment I have heard nothing definite about outcome of my representations before Mr. Holland. I know only that the Nicaragua Ambassador to Washington has now returned to that city after having consulted with his Government. As you, I feel it is highly improbable that Nicaragua should accept the obligatory jurisdiction of the Court.

In such a case, how would you suggest that we use the work you are preparing? Your letter states that it is your opinion that such a work should be done and therefore the Honduran Government would very much like to know if you have any idea or suggestion to make thereon.

Allow me to remain, my admired Doctor Hudson,

Very truly yours,

(*Signed*) Esteban MENDOZA.

9. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 17 FEBRUARY 1956

17 February 1956.

My dear Mr. Minister:

1. I have today received your letter of 11 February 1956, and I must at once thank you for taking the trouble to attend to it.

. . . .

6. I am not surprised that you have heard nothing from Mr. Holland. The kind of thing that he attempted requires a good deal of time, and it is not to be decided very quickly. While it seems improbable that obligatory jurisdiction of the Court will be accepted by Nicaragua, there is some chance of it left.

7. On this chance, there is a basis for you to go to the Court. The document that I shall prepare, subject to your changes, might be filed with the Court. Nicaragua could then be notified by the Court of the case. The motion would rest upon the Nicaraguan declaration of September 24, 1929, followed by the Nicaraguan telegram to the League of Nations of November 29, 1929. Nicaragua's obligation under the Statute of the International Court of Justice would depend upon Article 36 (5) of the Statute of the Court.

8. In case of this use of the document that we shall prepare, the document can be used in many capitals of the world, and especially in Tegucigalpa. I think this is a matter that is worthwhile, quite apart from the action which the Nicaraguans may take.

9. I am not yet sure whether I shall get to Honduras this year. I shall certainly let you know in lots of time for meeting my requirements.

Very sincerely yours,

(*Signed*) Manley O. HUDSON.

10. LETTER FROM ESTEBAN MENDOZA TO MANLEY O. HUDSON OF 2 MAY 1956 (SPANISH AND ENGLISH)

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 2, 1956.

Honorable Doctor Hudson:

I am pleased to send you English translation of Minutes of Exchange of Ratifications to Gámez Bonilla Treaty, which took place in San Salvador, on December 24, 1896.

I am also sending you ratification instruments to Nicaragua and Colombia 1928 Treaty and Minutes of Exchange of said ratifications. In my judgment this constitutes one of the most effective and valuable proofs of the fact that Nicaragua, as late as 1930, implicitly recognized the validity of the Spanish King's Award.

I have lately learned from a reliable source that the Nicaragua Government would be willing to accept the compulsory jurisdiction of the International Court of Justice, when Honduras files demand for the execution of the King of Spain's Award. However, due to reasons of internal politics, as President Somoza, now in power, wishes to be re-elected, the Nicaraguan Government would like to have Honduras postpone filing Court proceedings until after February 3, 1957, date on which elections will be held in that country.

The Honduras Government would be willing to make a written and confidential declaration before the State Department, obligating itself to put off starting proceedings until after elections have taken place in Nicaragua, provided that the Nicaraguan Foreign Office should now issue a statement declaring that it accepts as legally valid, declaration made by Mr. T. F. Medina in Geneva, on September 24, 1929, recognizing on behalf of Nicaragua the compulsory jurisdiction of the Permanent Court of International Justice. This would give us time to prepare demand and all the necessary documents. I would appreciate your comments in this regard.

I have received preliminary study on the demand which you sent me. I am studying same thoroughly and I can already advance my opinion that it is an excellent work.

I take pleasure in offering you once more the tokens of my highest esteem and consideration, and remain

Very truly yours,

(Signed) Esteban MENDOZA.

11. Letter from Manley O. Hudson to Esteban Mendoza of 7 May 1956

7 May 1956.

My dear Mr. Minister:

I am delighted today to have your letter of May 2, 1956.

1. I am pleased to have a translation of the exchange of ratifications of the Bonilla-Gámez Treaty at San Salvador, December 24, 1896. We have had Bonilla's Collection of Treaties for some time.

2. I thank you also for the exchange of ratifications of May 5, 1930, of the Colombian-Nicaraguan Treaty.

3. The news about Nicaragua is extremely good! It appears that Nicaragua would postpone the Court proceedings until after February 3, 1957. That date would be satisfactory to me. I shall have the Application properly drafted by the end of June. If I get your comment on time, it will be sent to you in the latter part of June.

4. Would the date be satisfactory to Honduras and to you? The Nicaraguan proposal would hold up the Application for seven months *plus*. In addition, it would seem that President Somoza's reelection is envisaged. This is a pretty large concession for you to make, but it may be worthwhile if you are satisfied with the results.

5. You envisage a written and confidential declaration to be made before the U.S. Department of State; but this would be provided that Nicaragua made a statement concerning the declaration made by Mr. T. F. Medina at Geneva on September 24, 1929. In other words, you would ask Nicaragua to make a declaration reviving its declaration of about twenty-seven years ago.

6. On this point you ask for my comment, which is along lines as follows:

> (*a*) Is it necessary that Nicaragua go back twenty-seven years and revive the declaration of 1929? It would be sufficient for Nicaragua to accept the jurisdiction in this case with reference to this matter.
>
> (*b*) Is action needed by the legislature of Nicaragua? It can be contended that the Nicaraguan Congress has acted in 1939, and that this action is sufficient in that it made Nicaragua a Member of the Court. This would mean that only seventeen years must be envisaged since the date of the Congress' action.
>
> (*c*) It may be possible for Nicaragua to act without that past story's being revived. Perhaps you should seek such action, and this possibility must occur to you.
>
> (*d*) I am a bit doubtful of this. It seems that this might involve delay, and I don't want that to happen. I think it would be better if we could go in the state in which the thing now is. Perhaps this can't be done that way, and some modification of the proposal would seem to be necessary.

7. You say that acceptance of the jurisdiction would mean that you would have time to prepare "all the necessary documents". I think you mean the necessary documents including the *Case*, which would be a considerably longer

document than the document which I have undertaken to prepare for you. I should be prepared to undertake the preparation of a Case, if you wish it.

With extremely warm regards, I am

Yours sincerely,

(*Signed*) Manley O. HUDSON.

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12. LETTER FROM ESTEBAN MENDOZA TO MANLEY O. HUDSON OF 26 MAY 1956 (SPANISH AND ENGLISH)

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 26, 1956.

Honorable Doctor Hudson:

I have read several times very carefully your proposed draft for Application by Honduras to the International Court of Justice. Taking into consideration that this is the fundamental and basic document for the move we are planning, it is necessary that this Application should be as perfect as possible.

I can make but a few observations thereon, as follows:

(*a*) According to international law and current practice, in order that a court should undertake trial of a case of any nature whatsoever, it is essential that parties interested in the controversy submit proof previously of their inability to settle dispute by direct agreement and that therefor they find themselves compelled to resort to a justice court.

(*b*) To fulfill this requirement, the Honduran Government has sent two notes to the Government of Nicaragua — one dated July 11, 1955, and the last one January 12, 1956. In both of these communications the Government of Honduras insists on the validity and compulsory nature of Award rendered by His Majesty the King of Spain, demanding the prompt execution of same. The Nicaraguan Government answered the first of said notes under date of September 29, 1955, claiming the Award's nullity, repeating the same arguments it has used since 1912. To date the Nicaraguan Chancery has not replied to communication sent over four months ago by the Government of Honduras, and in all certainty, if it ever does it will be continuing to reject our claims. This alone constitutes sufficient proof of the fact that it is impossible to settle this matter directly between both countries and therefor we are compelled to submit question for a final decision to the Court.

(*c*) In order you may be acquainted with contents of aforesaid notes and use same in the most advantageous way, I will soon forward to you an English translation of them.

In accordance with Minutes of the Sessions of the Nicaraguan Senate and Chamber of Deputies, which I suppose are in your possession, the ratification of the Signature and Statute Protocol of the Permanent Court of International Justice took place in *1935* and not in 1939, and based on this I consider that perhaps it would be advisable to make a correction at the end of No. 10, page 41 of your draft.

For reasons analogous to the ratification date of the Protocol and Statute, perhaps it would be convenient to make some clarification in paragraphs 12 and 13, page 15 of draft.

On page 101, paragraph 20, line 7, it reads that the Fifth Session was held in Danli, "in the disputed territory". In view of the fact that Danli has never been territory claimed by Nicaragua, I think it is convenient to suppress said phrase.

In the final part Honduras just requests that the International Court of Justice declare that the Nicaraguan Government is under the obligation to execute Award rendered by His Majesty the Spanish King on December 23, 1906.

As you well know, the Nicaraguan Government has granted on various dates, for several years, all kinds of lumber and mining concessions in the Honduran territory occupied by Nicaragua, which has caused considerable losses to the Honduran national economy. In addition, due to Nicaragua's refusal to execute the King of Spain Award, Honduras was compelled in 1918 and 1937 to resort to mediation, thus having to make large disbursements. And finally we would have to take into account the large expenditures to be made before obtaining a resolution from the International Court of Justice. Under such circumstances, do you think that Honduras is entitled also to request an indemnity?

Except for the above considerations I have nothing else to add for the moment regarding work prepared by you, which I consider of such a high quality that proves once more your excellent and highly appreciated qualifications as an internationalist of world-wide renown.

I have the honor to express to you once more my deepest appreciation and distinguished consideration, and remain.

Very truly yours,

(*Signed*) Esteban MENDOZA.

13. Letter from Manley O. Hudson to Esteban Mendoza of 31 May 1956

31 May 1956.

My dear Mr. Minister:

1. You have been good enough to send me the Minutes of the Senate and Chamber of Deputies of Nicaragua, in which it appears that the two bodies consented to the ratification of the Protocol of Signature and Statute of the Permanent Court of International Justice in 1935. Acting on your letter of May 9, 1956, we had previously found the action of the Senate and of the Chamber of Deputies.

2. You and Dr. Dávila seem to think that this is a sure basis on which to establish the jurisdiction and competency of the International Court of Justice, to resolve the petition which Honduras will make against Nicaragua.

3. We have examined all of *La Gaceta* from January 1, 1935, down to January 1939, and the numbers which appeared from July of 1939 to the end of June 1940. We are continuing to examine *La Gaceta* to cover all of the numbers down to 1941. We have found nothing. As you know, it is a terrible job: we have no index, and no guide to *La Gaceta*.

4. I think your opinion is very optimistic that there is any basis on which to establish the jurisdiction of the International Court of Justice, or even the Permanent Court of International Justice. We have not found any action taken by the President of Nicaragua on the Protocol of Signature and the Statute of the Permanent Court of International Justice, as required by the text of paragraph 3 of the Protocol of Signature of December 16, 1920; I cannot find that this provision had been modified by the Protocol concerning the Revision of the Statute of the Permanent Court of International Justice of September 14, 1929. (I am sending you the Fourth Edition of the Statute and Rules of the Court.) The action by the President of Nicaragua would be necessary for your conclusion that there is a sure basis on which to establish the jurisdiction of the Permanent Court of International Justice and the International Court of Justice. A vote in favor of ratification by the two bodies of the National Congress merely means, to us, that the two bodies are giving consent to ratification by the President.

5. It is the ratification by Nicaragua of the Protocol of Signature and the Statute of the Permanent Court of International Justice, for which we are looking. The nearest indication we have of it is the telegram of November 29, 1939. It is not the ratification of the Statute and Protocol of the Permanent Court of International Justice, but it is a notice that they were sending the ratification *oportunamente*. The ratification was not received.

With warmest regards, I am

Sincerely yours,

(*Signed*) Manley O. Hudson.

14. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 26 JUNE 1956

June 26, 1956.

My dear Mr. Minister:

1. I refer to your letter of June 19, 1956, which I have received yesterday.

. . . .

5. It seems to me somewhat early to talk about what you call the Counter-Case. If you will notice Article 41 in the Rules of Court, you will see that much depends on whether the proceedings are initiated by Special Agreement, or whether they are initiated by Application. We don't know whether there is to be a Counter-Memorial or not, nor do we know whether we must have a Reply or not. We might be limited to a statement concerning the jurisdiction of the Court. If it is to be a Counter-Memorial, or a Reply, it probably would take some time. I suggest that, at the present time, you arrange for the payment of what you have agreed on for the draft of the Application, and what may be agreed on for the Memorial. There need be no special agreement made at this time for the Counter-Memorial, as that must be left for adjustment.

6. I am not sure what is in your mind when you refer to the "Findings" ("conclusiones"). If this refers to whatever final papers may be necessary, perhaps I can assume some or all of this expense.

. . . .

8. I have decided to leave for Geneva on July 4, leaving Cambridge on July 3; so that I shall be there July 5, 1956. Please address a reply *at once* to me at *Hotel d'Angleterre, Geneva, Switzerland.* My plan is to work on the Memorial as soon as I arrive there.

With warm regards, I am

Very sincerely yours,

(*Signed*) Manley O. HUDSON.

15. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 23 AUGUST 1956

Hotel d'Angleterre, Genève.

Aug. 23, 1956.

Dear Mr. Minister:

1. I thank you very much for your letter of July 14, 1956 (the Spanish is dated Aug. 17, 1956).

2. I am very glad to have the statement concerning the fee for the preparation of the Memorial.

3. I am not at all hopeful that the Court will decide the jurisdiction in our favour. I have stated the case in the Application. Men with whom I have talked generally seemed doubtful about the Court's upholding the jurisdiction. We have stated in the Application that the Court would bear down on the failure to send in the "Ratification". I think we can do no more as things now stand. I regret this very much.

4. I shall be glad to see Dr. Dávila in Sept. I plan to be back on Sept. 4.

With high esteem I am,

Most sincerely yours,

(Signed) Manley O. HUDSON.

Of course the Nicaraguans may not attack the jurisdiction.

16. Letter from Jorge Fidel Durón to Manley O. Hudson of 30 April 1957

Tegucigalpa, Honduras, April 30, 1957.

Dear Professor Hudson:

I have your two letters of March 29 and April 25, 1957, for which I wish to thank you.

First of all, allow me to excuse myself for not having answered sooner. However, it is needless for me to say that with two important cabinet portfolios, State and Education, now in my hands, my time is limited for writing personally personal letters.

The situation with Nicaragua has now become so acute that the Military Junta adopted the following course. Having the neighboring Government attacked us again and taken possession of Mocoron, some 22 kilometers from the bordering Segovia river, after exhausting the peaceful methods of protest and obtaining no satisfaction but instead a new daring declaration that Mocoron belongs to Nicaragua, there was no other course but to start a cleaning operation which involves not only the new territory invaded but also the one illegally occupied since 1937, while we were signing the Pact of Reciprocal Offerings of San Jose agreeing to withdraw all troops, pact which we did keep, but unilaterally.

Simultaneously, on April 28, my Office announced to the "OEA" that we were accusing the Nicaraguan Government as aggressor under the clauses of the Rio Pact of Reciprocal Assistance of 1947 and the Bogota Pact of 1948, promise which we kept and at 6:pm today our allegation, as per enclosed copies, was filed with Dr. Fernando Lobo, President of the "OEA" in Washington by our Ambassador.

As this proceeding is unique in our history we are still unacquainted with the rules of procedure but we believe that at least, by notifying also the Foreign Offices of all member States, we have left clear that the Nicaraguan Government is an aggressor and expect to prove it as we are gathering all the necessary proof to be adduced by a Delegation composed of Dr. Ramón E. Cruz, Dr. Marco A. Batres, Dr. Humberto Lopez Villamil, Secretary Dr. Hidalgo and Engineer Ynestroza with you as our Counsel. Dr. Villamil shall call on you as he is leaving tomorrow in advance of the rest of the Delegation.

The terms proposed by you are acceptable and Dr. Villamil will talk to you more specifically on the subject. First of all, what we want to do is to create conscience around the justice of our case by proper divulgation and distribution of the opinion of the brief of John Bassett Moore.

With renewed admiration and esteem, believe me, Sir, your friend sincerely,

(*Signed*) Jorge Fidel Durón.

17. LETTER FROM RAMÓN E. CRUZ TO MANLEY O. HUDSON OF 25 JUNE 1957

June 25, 1957.

Dear Judge Dr. Hudson:

It is a great honor for me to refer to your letter of May 27. I should take this opportunity to tell you how much I enjoyed to have met you, and how great is the esteem you deserve of the Honduran people for the excellent advice you are giving to us.

At large I will give you a digest of the main activities carried out upon returning from Washington:

1. I attended the Conference of Foreign Affairs Ministers held in Antigua Guatemala, Guatemala. The purpose of the meeting was to discuss a way on how the Governments of Honduras and Nicaragua could reach, by direct agreement, a settlement of their differences. Unfortunately, nothing was carried out. The Nicaraguan Foreign Minister declared, however, that Nicaragua agrees to submit the case before the Court of International Justice.

2. This month we have been working on the same subject, but in a special manner studying three drafts of agreements proposed by the Commission *Ad-Hoc* of the Organization of American States. On the 20th, two members of said Commission arrived in town, Ambassadors Quintanilla and Garcia. With them we discussed the drafts above mentioned, having accepted the third whose main articles read as follows:

(1) The Contracting Parties having recognized and accepted *ipso facto* the jurisdiction of the Court of International Justice in the "Pacto de Bogotá", now agreed to submit the present case to the Court, in order to settle their differences regarding the *Award of the King of Spain of December 23, 1906*.

(2) The award duly pronounced and notified to both parties will be final and shall be executed immediately.

(3) If any of the Contracting Parties refuses to carry out the obligation imposed on her by the judgment of the Court, the other, before demanding the good offices of the Security Council of the United Nations, shall promote a meeting of Foreign Affairs Ministers, this board will determine the necessary compulsory measures to be applied in order to carry into effect the Judicial Award. Perhaps, to give more effectiveness to the agreement, the Council of the Organization of American States shall make out a decree advising the parties to carry on to practice the terms of the agreement, and thus avoid that such instrument be ratified by the Congress of both countries.

The Minister of Foreign Affairs agrees with you on the elimination from the application the plea for compensation for injuries.

Because of the aggression of Nicaraguan soldiers to Mocoron, Honduras introduced before the Organization of American States formal protest against Nicaragua taking into account Article 70 of the "Tratado Interamericano de Asistencia Reciproca of Rio de Janeiro" of September 2, 1947. The procedure before the Organization will end with the recommendation to the parties to appear before the International Court of Justice. This situation prevailing between Honduras and Nicaragua is the result of Executive Decree of the Honduran

Government of February 21, 1957, creating the "Departamento de Gracias a Dios" at the Mosquito Territory as far as Rio Segovia.

I believe that it would be essential to add the above facts in the application and memorial as new facts, if you so agree.

I take this opportunity to extend to you my best and sincerest wishes for your health.

Very sincerely yours,

(*Signed*) Ramón E. CRUZ.

18. TELEGRAM FROM UNITED STATES EMBASSY TEGUCIGALPA TO SECRETARY OF STATE OF 19 MARCH 1957

March 19, 1957.

Have confidential information that Manley Hudson of opinion that Honduras' assumption that Nicaragua is subject to the Court may not be valid since advice to Court of submission to jurisdiction was by Foreign Office cable promising to later forward written ratification which apparently never sent. Assume however in view advice from Managua and Washington of Nicaraguan willingness ICJ adjudication that every effort will be made to see that Nicaragua does not back out from this possibility peaceful settlement problem for all time.

WILLAUER.

19. Letter from Whiting Willauer, United States Ambassador to Honduras, to R. R. Rubottom, Acting Assistant Secretary of State for Inter-American Affairs, of 19 March 1957

Tegucigalpa, Honduras,
March 19, 1957.

Dear Dick:

You will have now received the news that Honduras *has* publicly announced its decision to take the border dispute to the International Court. In view of my conversation with Jack Neal in which the Department seemed to be very pleased when I previously advised that Honduras intended this course of action, I assume that the actual taking of the action will go a long way towards calming any worries the Department might have as to Honduras' peaceful intentions, especially since in discussing and advocating this action with the Foreign Minister and the Junta I made the point that I felt that no nation that had a matter before the Court could use military self-help while the case was pending and still maintain stature in international eyes. I sincerely hope that Nicaragua will go along with the Court procedure as stated by the President to Tom Whelan and by Sevilla Sacassa through the Department, despite the fact, as per my cable No. 378, there appears to be some doubt as to whether Nicaragua has in fact already submitted itself to the Court's jurisdiction.

You will recall your cabled instructions which resulted in my pointing out to the Government of Honduras that in the absence of any public declaration of peaceful intention the climate for aid to Honduras, through Smathers Amendment loans, etc., would not be propitious. I hope that in view of Honduras' gesture of going to the Court that the climate is back to normal again and that the consideration of economic assistance can now receive a prompt decision on its merits. I would greatly appreciate your views on this as soon as convenient.

With warmest personal regards.

Sincerely yours,

(*Signed*) Whiting Willauer

20. Memorandum from the Department of State, Office of the Legal Adviser, 10 December 1946, transmitting Memorandum Entitled "Reference to International Court of Justice of Disputes Under Trusteeship Agreement for Japanese Mandated Islands", 6 December 1946

(Note: The only available copy of this memorandum is of poor quality and difficult to read, especially at page 4, which contains the material relevant to this case. Therefore, for the convenience of the Court, the United States has included a retyped version of that page)

[Pages 1-3 of Memorandum of 6 December 1946 not reproduced]

December 10, 1946.

To: SPA, Alger Hiss
AH, E. A. Gross
IS, H. F. Bancroft
DA, J. F. Green
JA, H. A. Borton

From: Le, J. B. Howard

I am attaching a memorandum on reference of disputes under the trusteeship agreement for the Japanese mandated islands to the International Court of Justice. I would appreciate your comments so that the memorandum may be prepared in final form for submission to New York.

Attachment

As stated above.

[Page 4]

alone were competent to enforce the agreement against the United States, no dispute could be adjudicated by the Court inasmuch as the Security Council may not be a party before the Court and the only legal remedy of the Security Council would be to request an advisory opinion from the Court.

If other members of the United Nations are permitted to enforce their rights against the United States under the trusteeship agreement directly in the Court, the agreement would in this respect resemble a multilateral agreement. In such case, it should be noted that the Senate resolution provides that the declaration of compulsory jurisdiction shall not apply to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction". Even though the trusteeship agreement may not be a "treaty", it is doubtful whether the principle in this proviso was intended by Congress to apply only to treaties and not to executive agreements, since breaches of obligations under both come equally within the compulsory jurisdiction accepted in the declaration. The acceptance of the New Zealand type provision would therefore appear to constitute an agreement to jurisdiction of the type excepted in the proviso in the absence of special agreement. The type of provision which is recommended in this paper would permit as a limitation upon the agreement of the United States to jurisdiction of the Court over disputes arising under the trusteeship agreement, the requirement that all parties affected by the decision must also be parties to the case before the Court.

Le : JBHoward : jdr
12/6/46

21. "PRESIDENT'S POWER TO GIVE NOTICE OF TERMINATION OF US-ROC MUTUAL DEFENSE TREATY", MEMORANDUM FOR THE SECRETARY OF STATE FROM THE LEGAL ADVISER, DEPARTMENT OF STATE, 15 DECEMBER 1978, AS REPRODUCED IN TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979

December 15, 1978.

This memorandum confirms my advice to you that the President has the authority under the Constitution to decide whether the United States shall give the notice of termination provided for in Article X of the US-ROC Mutual Defense Treaty and to give that notice, without Congressional or Senate action.

While treaty termination may be, and sometimes has been, undertaken by the President following Congressional or Senate action, such action is not legally necessary and numerous authorities recognize the President's power to terminate treaties acting alone. Presidents have exercised that power on several occasions. The following sections of this memorandum note the views of a number of Constitutional and international law authorities, and identify previous Presidential treaty terminations undertaken without action by Congress. An Appendix to this memorandum contains detailed histories of past US treaty terminations.

VIEWS OF CONSTITUTIONAL AND INTERNATIONAL LAW AUTHORITIES

The *Restatement of the Foreign Relations Law of the United States*, by the American Law Institute, states in Section 163:

> "Under the law of the United States, *the President or a person acting under his authority, has, with respect to an international agreement to which the United States is a party, the authority to . . . take the action necessary to accomplish* under the rule stated in section 155 *the termination of the agreement in accordance with provisions included in it for the purpose . . .*" (At p. 493.)*

Section 155 of the Restatement provides that "An international agreement may be . . . terminated in accordance with provisions included for that purpose in the agreement" (at p. 477). The *Restatement* comment to Section 163 states:

> "The rules stated in this Section are based on the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by Article II, Section 1, of the Constitution . . . The great majority of cases in which the President suspends or *terminates, by acting alone, an international agreement to which the United States is a party*, are cases in which the agreement contains provisions for its suspension or termination."

Professor Louis Henkin, Hamilton Fish Professor of International Law at

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* Emphasis supplied throughout.

Columbia University, states in his book *Foreign Affairs and the Constitution* (1972) that:

> "Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; *nor has the Senate any authoritative voice in interpreting a treaty or in terminating it.*" (At p. 136.)

Dr. Elbert M. Byrd, Jr., of the University of Maryland, has written in his book *Treaties and Executive Agreements in the United States* (1960) that:

> ". . . from a constitutional view, it is much easier to terminate treaties than to make them. A treaty, by definition in constitutional law, can come into existence only by positive action by the President and two-thirds of the Senate, but a simple majority of both Houses with the President's approval can terminate them, and *they may be terminated by the President alone.*" (At p. 145.)

Professor Laurence H. Tribe, of the Harvard Law School, has written in his recently published *American Constitutional Law* (1978) as follows:

> "Although influenced (often decisively) by congressional action or constitutional restraint, *the President . . . has exclusive responsibility for* announcing and implementing military policy, for negotiating, administering, and *terminating treaties* or executive agreements; for establishing and breaking relations with foreign governments; and generally for applying the foreign policy of the United States." (At pp. 164-165.)

Mr. Wallace McClure, in his work entitled *International Executive Agreements* (1941), wrote:

> "It is customary for treaties to carry provisions laying down the steps to be taken if one of the participating governments wishes to divest itself of the obligations which have been assumed; for instance, a year's notice by one party to the other or others. But treaties do not specify the organ of the national government by which such notice is to be given. *In the United States the Executive gives the notice. Sometimes he has given it on his own initiative solely.*
>
> In treaty making the Senate may be said to act merely as executive adviser and check against positive action; *negative action*, not being feared by the constitution makers, *was left to the repository of general executive power, that is, to the President.*" (At pp. 16, 306.)

Professor Myres S. McDougal, William K. Townsend Professor of Law at the Yale Law School, wrote as follows in his study with Asher Lans on "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", 54 *Yale Law Journal* 336 (1945):

> ". . . termination [of treaties] may be effected by *executive denunciation*, with or *without prior Congressional authorization*" (at p. 336).

Professor Randall H. Nelson, of Southern Illinois University, in an article entitled "The Termination of Treaties and Executive Agreements by the United States: Theory and Practice", 42 *Minnesota Law Review* (1958) wrote that:

> "Diplomatic practice coupled with judicial opinion demonstrates that the President, as the chief organ of foreign relations, has the primary responsi-

> bility with respect to the termination of treaties. *He may perform this function alone* or in conjunction with the Congress or the Senate." (At p. 906.)

The late Professor Jesse S. Reeves, of the University of Michigan, in an article entitled "The Jones Act and the Denunciation of Treaties", 15 *American Journal of International Law* (1921), stated that:

> "It seems to be within the power of the President to terminate treaties *by giving notice on his own motion without previous Congressional or Senatorial action.* It would seem, on the other hand, that the President cannot be forced by Congress or by the Senate to perform the international act of giving notice." (At p. 38.)

Professor Westel Willoughby, late of Johns Hopkins University, wrote in his work *The Constitutional Law of the United States* (1929) that:

> "It would seem indeed, that there is *no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress* for its approval and ratification although, as has been seen, this has been done several times." (Vol. I, at p. 585.)

PREVIOUS PRESIDENTIAL TREATY TERMINATIONS

The President has taken action in a number of instances to terminate treaties without prior or subsequent action by either house of Congress. Such Presidential action has included giving notice of termination of bilateral treaties and notice of withdrawal or denunciation of multilateral treaties, pursuant to provisions in the treaties, and in a few cases, execution of termination agreements with the other parties to bilateral treaties.

Following are instances of treaty terminations effected by the President without Congressional or Senate action:

In 1815, President Madison exchanged correspondence with the Netherlands which has been construed by the United States as establishing that the 1782 Treaty of Amity and Commerce between the two countries had been annulled.

In 1899, President McKinley gave notice to the Swiss Government of the United States intent "to arrest the operations" of certain articles of the 1850 Convention of Friendship, Commerce and Extradition with Switzerland.

In 1920, President Wilson by agreement terminated the 1891 Treaty of Amity, Commerce and Navigation with Belgium concerning the Congo.

In 1927, President Coolidge gave notice of termination of the 1925 Treaty with Mexico on the Prevention of Smuggling.

In 1933, President Roosevelt delivered to the League of Nations a declaration of the United States withdrawal from the 1927 multilateral Convention for the Abolition of Import and Export Prohibitions and Restrictions.

In 1933, President Roosevelt gave notice of termination (which was withdrawn subsequently) of the 1931 Treaty of Extradition with Greece.

In 1936, President Roosevelt approved a protocol (deemed to be notice of termination) terminating the 1871 Treaty of Commerce and Navigation with Italy.

In 1939, President Roosevelt gave notice of termination of the 1911 Treaty of Commerce and Navigation with Japan.

In 1944, President Roosevelt gave notice of denunciation of the 1929 Protocol to the Inter-American Convention for Trademark and Commercial Protection.

In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise.

In 1962, President Kennedy gave notice of termination of the 1902 Convention on Commercial Relations with Cuba.

In 1965, President Johnson gave notice of denunciation, subsequently withdrawn, of the 1929 Warsaw Convention concerning international air travel.

In addition to the above-listed Presidential actions to terminate treaties without Congressional authorization, as indicated earlier in this memorandum Presidents also have terminated treaties following enactment of laws providing for the termination, or in two cases, adoption of a resolution by the Senate. There also have been two occasions on which Presidential action terminating a treaty was subsequently "adopted and ratified" by statutory enactment. These instances do not, however, individually or in the aggregate, detract from the President's authority to act alone.

CONSTITUTIONAL HISTORY AND THEORY

The Constitution does not specifically address the question of treaty termination. The subject was not discussed at the Constitutional Convention and seems not to have received much attention in the early years of the Republic, perhaps because provision for termination by notice first appeared in a United States treaty in 1822. 1 Malloy *Treaties* (1910) 373. Several of the constitutional framers, including Jefferson and Madison, recognized that Congress could, by enactment of legislation, annul or rescind a treaty. Alexander Hamilton, writing of President Washington's 1793 Neutrality Proclamation in respect of France and its effect on the continuing validity of United States treaties with France, said:

> "The right of the executive to receive ambassadors and other public ministers . . . includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation . . .
>
> This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive to decide upon the obligations of the country with regard to foreign nations.
>
> Hence, in the instance stated, treaties can only be made by the president and senate jointly, but their activity may be continued or suspended by the president alone." (*Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793*, Gideon, Washington, 1845, pp. 12-13.)

A Presidential notice of termination pursuant to the terms of a notice provision does not constitute an abrogation or repeal of the law of the land, but rather is a termination in the manner prescribed by the terms of the treaty, as approved by the Senate. The President's constitutional power to give a notice of termination provided for by the terms of a treaty derives from the President's authority and responsibility as chief executive to conduct the nation's foreign affairs and execute the laws. When a treaty takes effect as an international agreement and law of the land, the President must see that its terms are carried out. The Senate's role in giving advice and consent to the making of the treaty is fulfilled when the treaty is made; thereafter execution and performance of its terms, including terms relating to its duration or termination, are delegated by the Constitution to the nation's Chief Executive. Where the treaty provides for its termination by notice, the President, as the officer charged by the Constitution with the authority and responsibility for the conduct of the nation's foreign affairs and execution of the treaty, has the power to give such notice when he deems termination to be necessary or desirable for the best interests of the United States.

COURT DECISIONS

Three cases in which the Supreme Court has dealt with treaty terminations have reflected the principles that legislation may supersede the domestic legal effect of treaties and that whether a treaty should be deemed to be in effect for international law and foreign relations purposes generally will be determined by the position of the Executive.

Thus, in *Charlton v. Kelly*, 229 US 447 (1913), involving the question of whether non-performance by Italy of an extradition treaty justified refusal of performance by the United States, the Supreme Court held that it did not because:

> "... the political branch of the Government recognizes the treaty obligation as still existing ... The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant ..." (At pp. 474-476.)

In *Terlinden v. Ames*, 184 US 270 (1902), also involving the continued validity of an extradition treaty the Supreme Court stated "... we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance"; and it refused to review the position of the German Empire that the treaty was still in force "especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly". (At pp. 285-288.)

In *Van Der Weyde v. Ocean Transport Co. Ltd.*, 297 US 114 (1936), in which the Supreme Court held that a treaty provision had properly been abrogated as provided by Statute, it declined to pass on the President's power to terminate a treaty without Congressional authorization:

> "... we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it." (At pp. 117-118.)

CONCLUSION

Accordingly, President Carter has authority to give the notice of termination provided for in Article X of the US-ROC Mutual Defense Treaty.

Appendix to Memorandum for the Secretary of State

HISTORY OF TREATY TERMINATIONS BY THE UNITED STATES

THE EARLY PRACTICE

1798 Termination by Statute

The first treaties terminated by the United States were three US-French treaties of 1778, and these were terminated by a 1798 Act of Congress, whose validity was upheld by the US Court of Claims in 1887 in the case of *Hooper v. United States*, 22 Ct. Cl. 404 (1887). The Hooper case held that the treaties were terminated under both US domestic law and under international law. But with respect to the termination of the treaties as a matter of international law, the Court did not rely entirely upon the Act of 1798, but rather gave great weight to the actions of the Executive Branch. The Court held that the 1798 Act was "binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers". As for international validity, the Court said:

> "We fail to find that the Executive did, after the passage of the annulling statute, recognize the existing force of the treaties as an international obligation, whatever value may have been accorded to the claim of France that one party was without power to abrogate them." (Pp. 416, 423.)

For the Court of Claims, the Congress could terminate a treaty by statute for domestic law purposes, but apparently only the Executive Branch could terminate a treaty under international law.

1815 Madison Agreement to Termination of 1782 Treaty with the Netherlands

The first Presidential action that appeared to terminate a treaty occurred in 1815 during the Administration of President James Madison. The case is not clear-cut, but scholars have viewed it as the first Presidential termination of a treaty. There was no notice provision involved.

After the Napoleonic wars in Europe, discussions were held between the United States and the Netherlands concerning the legal status of the 1782 commercial treaty between the two countries. (10 Bevans 6; *Foreign Relations of the United States*, 1873, Part 2, pp. 720-727.) In 1815, the Dutch Minister in Washington gave a note to Secretary of State James Monroe proposing a treaty of amity and commerce and proposing as a basis for the treaty the text of the 1782 treaty. The 1782 treaty had not been formally terminated by the parties, and a question remained whether it was still in force.

On April 15, 1815, Secretary Monroe replied, in part:

> "The treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the state of Europe for some time past, and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time. . . . You have proposed to form a new treaty. To this the President has readily agreed." (*Ibid.*, p. 722.)

It was also suggested by the Netherlands that the 1782 treaty could be renewed. To this Secretary Monroe responded that "It is presumed that the former treaty cannot be revived without being again ratified and exchanged in the form that is usual in such cases, and in the manner prescribed by our Constitution." (*Foreign Relations of the United States*, 1873, Part 2, and Moore, *Digest of International Law*, Vol. V, p. 345.)

A few years later Secretary of State John Quincy Adams argued that the 1782 treaty nevertheless remained in force. He was then espousing certain claims of US citizens against the Netherlands on the basis of the 1782 treaty. The Netherlands denied the continuing force and validity of the 1782 treaty, and the United States agreed not to press the matter further. The claims were presented for payment by France.

The first negotiations in the 1820s between the United States and the Netherlands for a new commercial treaty failed, and it was not until 1839 that a new commercial treaty was agreed upon by the parties. It was followed by still another such treaty in 1852. (10 Bevans 22, 25.)

Several years later the issue of whether the 1782 treaty was still in force was raised once again, despite the 1839 and 1852 treaties, and on this occasion the Netherlands asserted that the 1782 treaty was still valid. In 1873 Secretary of State Hamilton Fish successfully argued that it had been agreed by the Netherlands Government and President Madison in 1815 to regard the treaty as terminated. Secretary Fish cited at length the correspondence between Monroe and the Dutch Minister, and concluded:

> "In the opinion of the President, this correspondence between Mr. Monroe and [the Dutch Minister], taken in connection with the subsequent action of the Dutch government in denying that the treaty had any valid operative force during the long period of eighteen years when its existence would have been of advantage to the United States, and also in connection with the acquiescence of the Government of the United States in that action, and its submission of the rejected claims for compensation from France, places beyond doubt the fact that the treaty of 1782, for a period of over fifty years, has been mutually regarded as no longer in force." (1873 *Foreign Relations*, *op. cit.*, p. 724.)

While the case did not entail Presidential termination by notice pursuant to a notice provision, it was an apparent example of treaty termination through executive action. There was a difficult question regarding the status of the 1782 treaty and the effect of the Napoleonic wars upon its continuing validity. President Madison might have maintained, as his successor did, that the treaty remained in full force and effect. Instead he agreed with the Government of the Netherlands "to form a new treaty". On behalf of the United States he agreed that the 1782 treaty was no longer in force, and he did so without benefit of advice and consent from the Senate or approval of the Congress.

Professor McDougal, who wrote in 1945 that treaty termination "may be effected by executive denunciation, with or without prior Congressional authorization", lists this 1815 action by President Madison as the first example of such executive denunciation. ("Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", 54 *Yale Law Journal* (March 1945), No. 2, p. 336.)

It should be noted further that there had been no violation of the treaty by the Netherlands, and there was no superseding treaty (until 1839) or statute. Nor was impossibility of performance a relevant factor in 1845.

1846 Polk Notice of Termination of 1827 Treaty

The precise issue of termination pursuant to a notice provision was not debated in the United States until 1846. That year President Polk gave notice of termination of the 1827 convention with Great Britain for the joint occupation of the Oregon territory. Congress enacted a joint resolution authorizing the President to give the one-year notice required under the treaty. This was the first case in the nation's history of termination pursuant to a notice provision.

President Polk himself recommended to the Congress in 1845 "that provision be made by law for giving" the notice. But it is not at all clear that the President believed such authorization to be legally necessary, and the Congress was itself unsure. There were several expressions of opinion that the President could give the notice without Congressional approval.

James Buchanan, who in March 1845 became Polk's Secretary of State and was himself to become President in 1856, said:

> "It could not . . . be expected that the President would give the proposed notice on his own responsibility alone. On the question of his abstract power to do so, I express no opinion." (*Congressional Globe*, Vol. 13, 28th Cong., 1st Sess., Appendix, p. 345, March 12, 1844.)

In 1845, before the inauguration of President Polk, a bill to organize a territorial government over the Oregon territory was debated in the House. The Chairman of the Committee on Territories said that when his Committee reported the bill, which had no provision for notice to terminate the 1827 convention, "they were leaving the executive to act when and how it pleased with regard to giving the notice". He declared that the Committee "did not conceive it a proper question, nor did he think it a proper question now in this House to say anything at all whether this notice should be given. . . ." (*Ibid.*, Vol. XIV, 28th Cong., 2d Sess., pp. 202, 222, Jan. 27, 30, 1845.)

On January 5, 1846, the House Committee on Foreign Affairs reported a joint resolution that "The President . . . cause notice to be given . . ." (*Ibid.*, Vol. XV, 29th Cong., 1st Sess., p. 138.) On the same day, three members of that Committee submitted a minority report recommending that the question of giving notice was "not a matter for the decision of Congress". The report indicated that the question of notice of termination was for the President alone, or for the President and the Senate together. The report said, in part:

> "The act of giving the notice is a high discretionary power, created not by the Constitution, but by the President in negotiating, and by the Senate in ratifying, a treaty with such a provision. . . . The House may be, and often is, required to exert appropriate legislative powers in the execution of treaties; but this notice is not one of that class. It has no property of a legislative power. It is executive in its essence, or it is, in our system, of the nature of, and incident to, the treaty-making power. It is a high discretion, pertaining not to our internal affairs, but to our relations with a foreign Government, created by this treaty-making power itself, resting with it, and depending upon its will alone for the exercise. . . .
>
> If the notice be expedient and proper, it has become so without its [the House's] act. It is rendered so by the refusal of the President to arbitrate the controversy, and by his closing further negotiation. These were his own acts, about which this House had no constitutional right to interfere. The President asked not its advice or interposition in them, whether they be proper or not. He alone was competent to their performance, and he alone ought to be held responsible; . . . it is his business, not that of the House. In the present state of the question, without expressing an opinion whether the notice ought or ought not be given, and as the solution of that question is constitutionally for him, or for him acting with the Senate, the House

> ought to be content to leave him to his proper judgment, discretion, and responsibility." (*Congressional Globe*, Vol. 13, pp. 138-139.)

One of the signers of the minority report, Mr. Caleb Smith, in debate on January 7, 1846, stated:

> "To my view it is inexpedient to give the notice, or to instruct the President in regard to his duty on the subject. This is a duty that belongs to the President, and he is responsible to the people for his discharge of it . . ." (*Ibid.*, p. 159.)

1858 Buchanan Notice of Termination of Treaty with Denmark

The next treaty termination by the United States was debated in 1855. A Senate resolution adopted that year by a two-thirds majority "authorized" President Pierce to give notice of termination of a commercial treaty with Denmark. In April 1856, the Senate Foreign Relations Committee issued a report which concluded that the Senate and President without the House could terminate the treaty. (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 501.) President Buchanan gave the notice in 1858, stating he had acted "in pursuance of the authority" of the Senate Resolution.

Once again, while a majority of those in the Senate who addressed the issue appeared to take the position that some legislative authority was required for the President to give a notice of termination, uncertainty seemed to be a central theme of the debates, and views were expressed supporting the right of the President to act alone pursuant to a notice provision. Thus, for example, Senator James Mason of Virginia, the Chairman of the Senate Committee on Foreign Relations, who had introduced the Senate resolution adopted in 1855, said that it was erroneous to treat the notification to Denmark "as an act abrogating or discontinuing a continuous and existing treaty, when, in truth, it is nothing more than causing a treaty to expire by the terms of its own limitation". Mr. Mason said:

> "I am rather disposed to think, although I express no opinion on it, that the President might, under the terms of the treaty with Denmark, without consulting either House, give the notice required, and his act would be perfectly valid." (*Cong. Globe*, 34th Cong., 1st Sess., p. 601.)

Former Attorney General Crittenden observed that if the President could act with the Senate there was no reason why he could not act alone, since there was nothing in the Constitution requiring him to consult the Senate in the abrogation of treaties. (*Ibid.*, p. 605.)

1864 Lincoln Notice of Termination of Rush-Bagot Agreement

The first instance of a notice of termination without any prior Congressional authorization came in 1864 under President Lincoln. He gave notice to Great Britain of US withdrawal from the Rush-Bagot Agreement in 1817 under which each nation had agreed to certain limitations on naval vessels on the Great Lakes. The Agreement, in the form of an exchange of notes, provided that it might be terminated by either party on six months notice. The notice was given on November 23, 1864. In his message of December 6, 1864, to Congress, President Lincoln noted that in view of the insecurity of life and property on the Canadian border it had "been thought proper" to give the notice in question. (James D. Richardson, *A Compilation of the Messages and Papers of the Presi-*

dents [New York: Bureau of National Literature, 1897], Vol. VI, p. 246.) A joint resolution was subsequently adopted by the Congress and approved by the President on February 9, 1865, which recited that the notice given was "adopted and ratified as if the same had been authorized by Congress". (13 Stat. 568.) The notice of termination was withdrawn by the United States on March 8, 1865, and the Rush-Bagot agreement has remained in force to the present day.

There is doubt as to the value of this case as a precedent since the Executive Branch has never considered the Rush-Bagot Agreement to be a treaty in the domestic law sense. It was concluded as a "pure" executive agreement without Congressional authorization. (For a detailed history of the agreement see letter of Secretary of State Foster to President Harrison, Dec. 7, 1892, published in Sen. Ex. Doc. 9, 52d Cong., 2d Sess.)

The next few cases of treaty termination by notice involved Congressional authorization or direction, without focus on the question of the President's power to give a notice without Congressional approval. On January 18, 1865, President Lincoln approved a joint resolution which charged the President with the communication of notice to terminate the 1854 treaty with Great Britain on fisheries, duties, and navigation. (1 Malloy, *Treaties*, 1910, 668, 672; 13 Stat. 566.)

In 1874 the Congress reverted to the use of the permissive joint resolution as in the case of the Oregon treaty. The 1874 resolution authorized notice for termination of the 1858 commercial treaty with Belgium. President Grant notified the Senate on March 9, 1875, that "pursuant to the authority" conferred on him by the joint resolution due notice had been given the Belgian Government. (18 Stat. 287; 1 Malloy, 1910, 69; *Cong. Recd.*, 43d Cong., 1st Sess., Part 5, Vol. 2, pp. 4507, 4704.) In 1882, Congress by a joint resolution approved by President Arthur on March 3, directed the termination of several articles of an 1871 treaty with Great Britain (1 Malloy, *Treaties*, 1910, 700; 22 Stat. 641.)

1879 Hayes Veto

The issue of treaty termination was raised in 1879 when President Hayes vetoed a bill which directed him to give notice to China of the "abrogation" of two articles of an 1868 treaty with China. (*Cong. Recd.*, Vol. 8, Pt. 3, 45th Cong., 3d Sess., p. 2276.) In his veto message of March 1, 1879, President Hayes said:

> "As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution." (Richardson, Vol. VII, pp. 518-519.)

President Hayes also said that "the authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is . . . free from controversy under our Constitution." (*Ibid.*)

It is clear that President Hayes was not referring to termination by notice in this message, nor was there any discussion of termination by notice throughout the Congressional debate on the matter. The treaty in question in this case did not contain a provision for termination by notice. Willoughby says in regard to Hayes' message that "it is clear that when he spoke of Congress as competent to express the will of the nation he had reference to the expression in the form of legislative enactments". (Willoughby, *The Constitutional Law of the United States*, 2d ed., Vol. I, p. 584.)

1899 McKinley Notice of Termination of 1850 Treaty with Switzerland

The second example in our history of the Executive acting alone in giving notice of termination occurred in President McKinley's administration in 1899. In this case, the notice may have beeen necessitated by the Tariff Act of 1897. The Convention of friendship, commerce and extradition with Switzerland of 1850 (11 Bevans 894; 11 Stat. 587) contained in Article XVII a provision for notification of intention "to arrest the operations" of the convention. After the United States, pursuant to a reciprocity agreement with France, had granted certain import benefits to that country under the Tariff Act of 1897, it was forced to grant Switzerland similar benefits pursuant to the most-favored-nation clauses contained in Articles VIII-XII of the 1850 treaty with Switzerland.

At the same time the United States notified the Swiss Government that if it was impossible to agree on some reciprocal arrangement with Switzerland, it might be necessary for the United States to arrest the operation of the convention or of certain articles thereof. It was contrary to US general policy and to the policy of the Tariff Act to make trade concessions in the absence of a reciprocal arrangement. On March 8, 1899, Secretary Hay instructed the American Minister to Switzerland to notify the Swiss Government of United States intent "to arrest the operations" of the 1850 convention so far as the operations of certain articles were concerned. (2 Malloy, *Treaties*, 1910, 1763.) The President, acting through the Secretary of State, took action in this case without consulting either the Senate or Congress.

In 1911, Senator Lodge, making no reference to any implied previous authorization by Congress, cited President McKinley's action in 1899 as a case in which the President "acted and did not ask to have his action approved". (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 479.)

1911 Taft Notice of Termination of Treaty with Russia

The next case of Presidential notice to terminate a treaty came in 1911 during the administration of President Taft. The United States and Russia were in dispute regarding the application of the commercial treaty of 1832, particularly as it related to Russia's treatment of American Jews. Article 12 of the treaty provided that it should remain in force until the end of the calendar year beginning after the date of notification by either party of intent to terminate. (2 Malloy, *Treaties*, 1910, 1514.) A strongly worded joint resolution demanding termination of the treaty was introduced in the House in early December and passed on December 13 by a vote of 301 to 1. On December 15, before the matter was acted on in the Senate, President Taft instructed the US Ambassador to Russia to give notice of intent to terminate the treaty.

Secretary of State Knox wrote to the Ambassador explaining the President's action: "it was manifest that even the President's veto of the resolution could not defeat, but could only prolong and embitter the agitation against the Treaty", and it was therefore decided that "rather than permit the denunciation to be forced by the action of Congress . . . the President should himself, in advance of the anticipated action of the Senate . . . exercise the right to set a term to the Treaty in accordance with its provisions and upon grounds which should imply no offence to Russia". (Hackworth, *Digest of International Law*, Vol. V, pp. 319-320; Taft, *The Presidency* (1916), pp. 112-114; Secretary Knox to Ambassador Guild, No. 66, Feb. 6, 1912, file 711.612/100 A.)

On December 18, President Taft notified the Senate of what he had done and said that he communicated "this action to the Senate, as a part of the treaty-making power of this Government, with a view to its ratification and approval". (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 453.) On December 21, the President signed a joint resolution declaring that the notice given by the President was thereby adopted and ratified.

While the Congress thus subsequently approved of Taft's notice of termination, it is not clear whether such approval was thought to be legally necessary. Mr. Knox commented again on the incident later as a Senator during the debate in the Senate in 1920 on withdrawal from the League of Nations:

> ". . . while it is true that . . . the Congress, by joint resolution, ratified and confirmed the act of the President, they recognized the validity of the act of the President in denouncing the treaty in accordance with its terms".

Senator Lenroot agreed with Mr. Knox, saying that it was his understanding that in the 1911 case the President

> "proceeded upon the assumption that, as the Executive, there being nothing to the contrary in the treaty itself, he had the right to give the notice of the denunciation of the treaty". (*Cong. Recd.*, Vol. 58, Pt. 8, 66th Cong., 1st Sess., p. 8132.)

President Taft's own views on the matter seem somewhat conflicting. As noted, he communicated the fact of his notice to the Senate "as a part of the treaty-making power of this Government, with a view to its ratification and approval". Elsewhere, however, he said that his action was something "which, as President, I had the right to do by due notice". (Taft, *The Presidency*, 1916, p. 113.)

Seamen's Act of 1915

In the Seamen's Act of 1915 (38 Stat. 1164), President Wilson was "requested and directed" to give notice to the foreign governments concerned that all provisions in conflict with the Act would terminate on the expiration of such periods as might be required in the treaties. Pursuant to this legislation the Department of State gave the required notices.

Merchant Marine Act of 1920

Section 34 of the Merchant Marine Act of 1920 authorized and directed the President to notify the governments with whom the United States had commercial treaties of its intent to terminate so much of the treaties as restricted the right of the United States to impose discriminating customs duties and discriminatory tonnage dues. (41 Stat. 988, 1007.) President Wilson approved the Act but declined to carry out the provisions with regard to treaty termination.

A Department of State Press Release of September 24, 1920, stated that the Department had been informed by the President that he did "not deem the direction . . . an exercise of any constitutional power possessed by the Congress". The Department pointed out that the treaties in question contained no provision for termination in the manner contemplated by Congress, and stated that the President therefore considered it misleading to speak of "termination", as the action sought to be imposed on the President amounted "to nothing less than the breach or violation of said treaties".

Secretary of State Hughes, in a memorandum to the President on October 8, 1921, said that while Congress had the power to violate treaties, an intention to do so was not to be imputed to it. For this reason, and because Congress had not seen fit to pass legislation in derogation of the treaties in question, Secretary

Hughes concluded that the fair construction of Section 34 would be that it authorized and directed the President to give notice for termination in cases where such notice could be given without violating the treaty. He further pointed out that Congress had not provided for the termination of the treaties in their entirety and said:

> "Accordingly, if the President should undertake to abrogate or terminate any of the commercial treaties in question in its entirety, he would be acting on his own responsibility as the Executive charged with the duty of conducting our foreign relations, and he would be unable to find in the language of Section 34 that the Congress had offered to share with him the responsibility." (Hackworth, *Digest of International Law*, Vol. V, p. 326.)

Senate Debate on Withdrawal from the League of Nations

The debates in the Senate on the possibility of withdrawal from the League of Nations also touched to some extent on the question of Presidential notice of termination. Article 1 of the League Covenant provided that any member of the League might, after two years notice of intention, withdraw from the League, provided its international obligations and its obligations under the Covenant had been fulfilled. When the treaty was before the Senate for its advice and consent to ratification, one of the reservations submitted by Senator Lodge provided that the United States should be the sole judge of whether its international obligations had been fulfilled and that notice of withdrawal might be given by a concurrent resolution of the Congress. There was considerable debate on the proposal.

Apart from the issue of notice by concurrent resolution, varying opinions were also expressed on the President's right to give a notice of termination without Congressional approval. Senator Spencer of Missouri, speaking in support of the Lodge proposal, said:

> "I mean to say, Mr. President, that if the President of the United States saw fit to give notice of withdrawal, that notice of withdrawal would be effective. If it was in violation of or in contradiction to the wishes of the Congress at the time, there would be certain restrictive action, like a joint resolution of Congress, which would be persuasive upon the President, but it would not deprive him of his power.
>
> Why, Mr. President, the case is precisely similar to that which confronts us now. If the Senate, by unanimous vote, should approve this treaty, that does not make the treaty. The President alone can send that treaty to the other signatory powers. His is the only voice which speaks for the United States in international relations; and if he pigeon-holes the treaty, though every Senator was in favor of ratification, the treaty would never come into effect. Such is the power of the Chief Executive of the Nation, and it illustrates the power of the President with regard to withdrawal." (*Cong. Rcd.*, Vol. 58, Pt. 8, 66th Cong., 1st Sess., Nov. 8, 1919, p. 8122.)

Senator Lenroot argued that if the Senate concluded at any time that the President had no unilateral power to terminate a treaty, impeachment could be resorted to, but he knew of no other way to control the action of the Executive. Mr. Lenroot said that the President is the final treaty-making power, since it lies within his power to refuse to complete the treaty after Senate action, and that therefore "he alone has the power, unless controlled in some way by the treaty itself or by action of Congress abrogating the treaty, to denounce" a treaty containing provision for termination. (*Cong. Rec'd., op. cit.*, p. 8132.)

On February 16, 1920, Mr. Lodge introduced an amendment to the previously agreed reservation on withdrawal, the amendment providing that notice might be given "by the President or by Congress alone whenever a majority of both Houses may deem it necessary". Thus a specific proposal was made permitting the President to act alone as an alternative to action by concurrent resolution. (*Cong. Rec'd.*, Vol. 59, Pt. 3, 66th Cong., 2d Sess., p. 2944.)

To the question whether if the original reservation (notice by concurrent resolution) were adopted, the President could nevertheless give notice alone, Mr. Lodge replied that that would be in line with the two precedents of Presidential unilateral action which he had cited (McKinley and Taft cases) and which were not questioned at the time. He said he thought it "at least doubtful whether the President has not the power to do that". (*Ibid.*, Vol. 59, Pt. 4, Feb. 21, 1920, p. 3230.) Senator Lodge's amendment was rejected, as was an amendment permitting notice of withdrawal authorized by joint resolution. The reservation in its original form was adopted. (*Ibid.*, pp. 3236, 3241, 3242.) In the end, of course, the Senate failed to give its advice and consent to ratification of the treaty as a whole, even with several reservations previously adopted.

(B) MODERN PRACTICE

While the early practice of the Republic indicated certain doubts and uncertainties whether the President alone might appropriately give notice of termination pursuant to a notice provision, the modern practice reveals no such doubts. The Congress may of course authorize the giving of notice, and has done so in the modern era. But the current rule, accepted by the Executive Branch, the Senate and Congress, and the great majority of modern writers, is that the President may also give a notice of termination without prior or subsequent Senate or Congressional approval.

1920 Agreement (Wilson) Terminating 1891 Treaty with the Congo

The first significant case in the modern era was the termination of the 1891 commercial treaty with the independent State of the Congo, which contained no provision for termination. The treaty was regarded as still in force after the extension of Belgian sovereignty over the Congo. In the absence of a provision for termination, the agreement of both parties was required to terminate it.

In 1915 the United States, pursuant to the Seamen's Act of 1915, notified Belgium of its intention to terminate Article 5 of the 1891 treaty as of July 1, 1916. The Belgian Government, in its reply of June 29, 1916, proposed the termination of the entire treaty. The Secretary of State then suggested on November 11, 1916, that notice to that effect should come from Belgium. On December 31, 1916, the Belgian Foreign Minister replied that the Belgian note of June 29 was intended as such formal notice and that the 1891 treaty would be deemed to have been denounced on July 1, 1916. He expressed the understanding that Article 5 had ceased to be operative on July 1, 1916, the other articles remaining in force for the time being.

On December 13, 1920, the United States informed the Belgian Government that it acknowledged the notice (of denunciation of the entire treaty) as given and received on July 1, 1916, and that since the 1891 treaty contained no stipulation respecting termination, it assumed that the wishes of the Belgian Government might best be met by considering that the treaty terminated after such a period of notice as was customarily provided for in treaties of amity and navigation. Accordingly, it was said, the United States regarded the treaty as having expired on July 1, 1917, one year after notification by the Belgian Government. (1 Malloy, *Treaties*, 1910, 328; Hackworth, *Digest of International Law*, Vol. V, pp. 317-318.)

The case is important, notwithstanding that there was no notice provision in the 1891 treaty. The negotiated agreement of the parties to terminate the treaty was made on the part of the United States by the Executive Branch acting without Congress by means of an Executive agreement. Yet there was no violation, no statute necessitating termination of more than one article, and impossibility of performance was not a relevant factor. In addition, this approach of termination by Executive agreement was apparently acceptable to the Senate, which did not question it at that time or subsequently. Previously, on March 27, 1919, the Acting Secretary of State, in informing the Senate of the requirements for abrogation of treaty provisions which might be affected by legislation, said that since the 1891 commercial treaty with the Congo had contained no provision for abrogation, "agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement". (Sen. Doc. No. 2, 66th Cong., 1st Sess., p. 14.)

At about the same time there occurred the last of the few instances of a President seeking authority to terminate a treaty. In May 1920 President Wilson sought the authorization of the Senate to the denunciation of the International Sanitary Convention of 1903. The *procès-verbal* of the deposit of ratification of the convention contained a declaration by the signatory powers reserving the right of denunciation. The Convention itself contained no provision for denunciation or notice of termination.

After President Harding's inauguration the Senate's advice and consent were given by a Senate Resolution of May 26, 1921, and notice of denunciation was subsequently given by the Executive. (Hackworth, *Digest of International Law*, Vol. V, p. 322; 2 Malloy, *Treaties*, 1910, pp. 2066, 2129, 2130; *Cong. Recd.*, Vol. 61, Pt. 2, 67th Cong., 1st Sess., p. 1793.)

1927 — Coolidge Notice of Termination of 1925 Treaty with Mexico

On March 21, 1927, during the Administration of President Coolidge, Secretary of State Kellogg directed the Ambassador to Mexico (Sheffield) to deliver to the Mexican Government a note giving the official notice of termination of a 1925 treaty with Mexico on the prevention of smuggling. (9 Bevans 949.) The action was taken pursuant to a provision for termination by notice, and the convention officially terminated on March 28, 1927. The notice was given without the direction of either the Senate or the Congress, and was not referred to either body for subsequent approval.

It has been argued that in view of the state of U.S.-Mexican relations at that time, it might have been impossible to implement the Convention. However, there is no evidence to support that contention. There was a dispute in 1926 and 1927 over American-owned property in Mexico, but by a vote of 79 to 0 on January 25, 1927, the Senate passed a resolution urging arbitration of the dispute. On April 25, 1927, President Coolidge expressed hopes for an amicable settlement, and on September 21 he named a new Ambassador. On March 27, 1928, the State Department declared that because of steps taken by the Mexican Government, the differences had been resolved. (See Richard W. Leopold, *The Growth of American Foreign Policy*, 1962, pp. 464-465.)

The Secretary of State's instructions to Ambassador Sheffield in 1927 gave no indication that it was "impossible" to perform the 1925 treaty. His instructions included the following statement as to the US reasons for giving the notice:

> ". . . the United States has no commercial treaty with Mexico, and . . . in the circumstances it is not deemed advisable to continue in effect an arrangement which might in certain contingencies bind the United States to cooperation for the enforcement of laws or decrees relating to the importation of commodities of all sorts into another country with which this Government has no arrangement, by treaty or otherwise, safeguarding American commerce against possible discrimination." (US Archives, 74D431 ; Box 16678.)

In sum, impossibility of performance was not a factor, there had been no treaty violation, and no subsequent inconsistent statute or treaty. The case stands as a clear-cut instance of Presidential notice of termination without prior or subsequent approval by the Senate or Congress.

1933 Roosevelt Denunciation of 1927 Multilateral Convention

In 1933 President Roosevelt, without prior or subsequent reference to the Senate or Congress, directed United States withdrawal from the 1927 multilateral convention for the abolition of import and export prohibitions and restrictions. (2 Bevans 651.) Article 6 of the protocol concerning the entry into force of the convention provided that any of the signatories to the protocol could be relieved of the obligations thereunder by forwarding a declaration to that effect to the Secretary-General of the League of Nations. (Hackworth, *Digest of International Law*, Vol. V, p. 329.)

It has been maintained that President Roosevelt terminated the 1927 Convention as having a restrictive effect on the National Industrial Recovery Act of 1933, and that the 1927 convention was inconsistent with prevailing legislation.

In fact there was nothing in the National Industrial Recovery Act of 1933 which required US withdrawal from the 1927 Convention. The real reason for US withdrawal was the failure of the Convention to gain wide acceptance by the nations of the world community. A convention on the abolition of import and export prohibitions and restrictions clearly needed widespread acceptance to be effective, and particularly during a time of world-wide economic depression.

The background to this US termination is as follows: The protocol concerning the entry into force of the Convention was signed at Paris on December 20, 1929, by the United States, Japan and several European countries: Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Romania, Switzerland and Yugoslavia. The protocol provided that the Convention was to be ratified by Poland and Czechoslovakia before May 31, 1930, in order to become binding upon all the signatories. An extension of this time-limit until June 20, 1930, in respect of Poland, and until June 26, 1930, in respect of Czechoslovakia, was agreed to by the contracting parties.

Czechoslovakia deposited a conditional instrument of ratification on June 25, 1930, with a declaration that its willingness to become a party would depend upon the ratification of the Convention by Poland. Poland announced on June 19, 1930, that it was obliged to postpone its ratification. This caused the Governments of Austria, Belgium, Hungary, Italy, Luxembourg, Romania and Switzerland to announce that as from July 1, 1930, they would cease to consider themselves bound by the Convention, since the conditions on which they had been willing to accede to it had not been fulfilled. By the terms of the protocol, the Governments of Denmark, France, Romania and Yugoslavia then ceased to be bound by the Convention, as from July 1, 1930. On June 30 Denmark waived the conditions which it had stipulated in regard to the ratification of Germany. Therefore the only countries remaining bound by the Convention on July 1, 1930, were the United States, Denmark, Great Britain, Japan, the Netherlands, Norway and Portugal.

Under the terms of Article 6 of the protocol, the United States, Denmark, Great Britain and Norway all announced their withdrawals as of June 30, 1933. Portugal had withdrawn as of June 30, 1931, and the Netherlands as of June 30, 1934.

The American Minister to Switzerland, Mr. Hugh R. Wilson, on June 20, 1933, presented the following note to the Secretary-General of the League of Nations:

> "In accordance with Paragraph 6 of the Protocol of December 20, 1929, to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, the Acting Secretary of State of the United States of America hereby gives notice of the American Government's withdrawal from this convention effective June 30, 1933. It is with great reluctance that the American Government has been forced to take this action. It had been hoped that the principle embodied in this convention would be widely accepted by the nations of the world. The reverse of this has, however, been true, and the withdrawal from the convention of other nations which had adhered leads to the conclusion that the existing convention may not be fully adapted to present economic and commercial conditions. In taking this present course it is the American Government's hope that there may result from the labors of the Monetary and Economic Conference now sitting at London a convention of this nature which will be widely adopted and adhered to by the nations of the world." (Dept. of State Press Release, July 5, 1933; US Archives, 74D431, 59-78-28, Box 37.)

Once again, there was no violation of the treaty, no subsequent conflicting statute or treaty, and impossibility was not a factor.

1933 Roosevelt Notice of Termination of 1931 Extradition Treaty with Greece

Later in the same year, 1933, the Executive without consultation with Congress or the Senate, gave notice of intent to terminate the extradition treaty with Greece signed on May 6, 1931, which contained provision for termination on one-year's notice after it had been in effect five years. (47 Stat. 2185.) The notice was occasioned by a dispute with Greece arising from the latter's refusal to surrender an individual accused of fraud. The United States believed that Greece was violating the treaty.

The notice was given on November 6, 1933, and the earliest possible termination date was November 1, 1937. The United States withdrew its notice of termination on September 29, 1937, after the United States and Greece signed a protocol of interpretation of the article of the treaty that had given rise to the dispute and the notice of termination.

It has been asserted that the notice was premised on the treaty already having been voided by Greece's violation. In fact the treaty was never voided, and remained in full force and effect between the parties throughout this period. The treaty remains in full force and effect to this day. (47 Stat. 2185; *TS* 855; 8 Bevans 353; 138 *LNTS* 293.)

It is true that the US notice of termination charges Greece with violating the 1931 treaty, and that the notice of termination was given for that reason. This case stands as the only instance of notice of termination given because of violation.

But the question remains whether this case is an exception to a purported rule requiring Senate or Congressional approval for termination by notice, or simply an application of the rule permitting a Presidential termination notice without Congressional approval. Under customary international law, as embodied in the Vienna Convention on the Law of Treaties, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty in whole or in part. Under customary law, there was no precise time prescribed for the notice of termination in such cases. Under the Vienna Convention rule, a notice of three months is required. (Vienna Convention, Articles 60 and 65.) If the United States had been operating in 1933 under the customary material breach rule, it could have terminated the extradition treaty with Greece at once by invoking the alleged breach and without having to give a notice which would keep the treaty in force for almost four years. Even the Vienna Convention rule, as noted, would have required only three months' notice.

It is generally accepted that the President may act unilaterally in giving a notice of termination if the other party breaches the treaty. Yet the Senate or the Congress could be requested to approve a notice given in such cases. It might be thought that pursuant to an approach requiring legislative approval, violation would make no legal difference. The President could make a finding of violation, but still require approval to give the notice.

On the other hand, if the argument is simply that practice has created an exception to the rule contended for, then practice must be a legally relevant consideration. If that is so, however the bulk of modern practice clearly establishes the right of the President to terminate by notice pursuant to a notice provision without legislative approval, whether or not there has been a violation. In only one of the 12 cases of such termination has the United States alleged violation by the other party.

In our judgment, the 1933 notice was not an exception to a rule under which legislative approval is required for notice even under a notice provision, but rather was an application of the rule that a President may give such notice on his own initiative.

1936 Roosevelt Termination of the 1871 Commercial Treaty with Italy

In 1936 President Roosevelt approved the proposal of the Department of State to give notice to Italy of intent to terminate the 1871 commercial treaty with Italy (9 Bevans 82) without seeking the prior or subsequent approval of the Senate or the Congress. Article XXV of the treaty contained a provision for notification of intent to terminate. On December 15, 1936, the American Ambassador to Italy and the Italian Minister of Foreign Affairs signed a protocol announcing the intention of each Government to terminate the treaty, the protocol being deemed the notice required under the treaty. (See Hackworth, *Digest of International Law*, Vol. V, pp. 330-331.)

It has been argued that the 1871 treaty would limit the President's ability to carry out the Trade Agreements Act of June 1934, and that the treaty was inconsistent with prevailing legislation.

It should be noted that the legislation referred to did not necessarily override or conflict with the earlier treaty. The Trade Agreements Act of June 12, 1934, provided that the President *may* suspend the application of the duties and other modifications of import restrictions proclaimed in trade agreements to articles from any country because of its discriminatory treatment of American commerce or because of other acts tending to defeat the principal purposes of the Act. The Department of State felt that Italy's trade control measures were prejudicial to American commerce. Since the suspension of the application of the benefits of trade agreements to Italian goods would have exposed the United States to a charge of violation of the most-favored-nation provisions in the 1871 treaty, the treaty did operate as a limitation on the discretion of the President in executing the Act. But there was no legal necessity for terminating the treaty. It was rather a matter of giving the President greater discretion in applying the provisions of the Trade Agreements Act by terminating the treaty.

Once again, the case is another application of the rule that the President may give notice pursuant to a notice provision in a treaty without Senate or Congressional approval, rather than an exception to a purported rule under which the President may not give such notice without legislative approval. Certainly in this case, it would have been possible for the President to seek Senate or Congressional approval of the notice to terminate.

But even assuming a real inconsistency between a statute and a treaty, or an earlier treaty that limits the President's discretion in applying the terms of a subsequent statute, it does not necessarily follow that in such cases the President should have a right of unilateral action pursuant to a notice provision. In such cases as well, legislative approval for the treaty termination could be sought.

The point is that a rule requiring legislative approval for notices of treaty terminations has not been established in our Constitutional law and practice. The 1936 termination of the 1871 commercial treaty with Italy stands as one more application of the established rule that the President may give notice of termination of a treaty pursuant to a notice provision with or without the prior or subsequent approval of the Senate or the Congress.

1939 Roosevelt Notice of Termination of the 1911 Commercial Treaty with Japan

On July 26, 1939, Secretary of State Hull wrote to the Japanese Ambassador to the United States giving notice of the intention of the United States to terminate the 1911 commercial treaty with Japan. (9 Bevans 416.) The treaty provided for termination upon six-months' notice. Resolutions were introduced in the Senate on July 18, 1939, and in the House on the following day to the effect that it was the sense of each House respectively that the United States should give the notice required by the treaty. Neither resolution purported to authorize or direct the President in the matter. Before either House had acted, Secretary Hull gave the notice.

It has been maintained that Senator Schwellenback felt that the President was "compelled" to denounce the 1911 Treaty with Japan because of US obligations under the 1922 Nine-Power treaty. In fact, there is nothing in the Nine-Power treaty (44 Stat. 2113; *TS* 723) that required the United States to terminate the 1911 commercial treaty with Japan. The Nine-Power treaty committed the United States, Japan and others to respect the territorial integrity of China, but Japan's invasion of China in 1939 did not legally require the termination of the 1911 treaty, which was entirely commercial in nature.

Nor did the actual notice of termination give any indication that our obligations unde the Nine-Power treaty necessitated the termination of the 1911 treaty. Had the United States been legally required to terminate the 1911 treaty, it might be expected that the notice of termination would have at least alluded to such requirement. The US notice states that the 1911 treaty

> "contains provisions which need new consideration. Toward preparing the way for such consideration and with a view to better safeguarding and promoting American interests as new developments may require, the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the treaty under reference, gives notice hereby of its desire that this treaty be terminated, and, having thus given notice, will expect the treaty, together with its accompanying protocol, to expire six months from this date." (See Hackworth, *Digest of International Law*, Vol. V, pp. 331-332; US Archives, 74D431.)

Senator Schwellenback did not argue that the United States was compelled to denounce the 1911 treaty because of our obligations under the Nine-Power treaty or for any other reason. Senator Schwellenback had introduced a joint resolution, which he believed was made necessary by the Nine-Power agreement, preventing the export from the United States of all goods and materials, except agricultural products,

> "which there is reason to believe will, if exported, be used, directly or indirectly, in violation of the sovereignty, or the independence, or the territorial or administrative integrity of any nation whose sovereignty, independence, and territorial and administrative integrity the United States is obligated by treaty to respect". (*Cong. Recd.*, Vol. 84, Pt. 10, 76th Cong., 1st Sess., p. 10783.)

Senator Schwellenback's only argument with respect to the 1911 treaty with Japan was that his proposed resolution was not inconsistent with that treaty and that notice was therefore unnecessary; if the 1911 treaty was thought to be a problem, however, he would not be "critical" of those who thought the 1911 treaty should be terminated by notice. He did not argue that the United States was compelled to denounce the 1911 treaty. Senator Schwellenback said:

> "Mr. President, I do not agree that the 1911 treaty should have prevented our Government from adopting the joint resolution which I introduced. I concede, however, that like all legal questions about which there is an argument, there can be an argument about that question. Under those circumstances I certainly am in no way critical of the Members of this body who contended that before we took further action the 6-months' notice should be given Japan. In matters of this kind, in which we base our position upon a treaty, certainly we must be punctilious. I do not think there was any necessity for our recognizing the 1911 treaty as an obstacle to the proposed action. However, as I say, I am not arguing that point with a view of arguing that my joint resolution . . . should be adopted during this session of the Congress." (*Ibid.*, p. 10785.)

It was also clear from other Department of State documents at the time that the Administration believed that it had discretion to give the notice. There was no indication that the Executive Branch felt legally compelled to give the notice by the terms of the 1922 Nine-Power treaty. On July 21, 1939, five days before the notice was given, and while the Senate resolution was pending, Secretary Hull wrote to Senator Pittman as follows:

> "Notwithstanding the authority which is vested in the Executive in regard to the matters mentioned in the resolution, I am glad to say that the Executive is always pleased to have advice from the Senate and to give such advice full and careful consideration consonant with the great weight to

> which the opinions of the Senate are entitled." (Quoted in Hackworth, *op. cit.*, p. 332.)

After the notice of termination was given by the Executive, the Department of State replied as follows to inquiries regarding the President's power to give such notice without the approval of the Senate:

> ". . . the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign State. This capacity, as you are aware, is inherent in the sovereign quality of the Government, and carries with it full control over the foreign relations of the nation, except as specifically limited by the Constitution. Without entering into a lengthy discussion of the general and specific arguments leading to this conclusion, it will perhaps be sufficient to quote the conclusion of Professor Willoughby (*Constitutional Law of the United States*, 2nd ed., I, p. 585): 'It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification, although, as has been seen, this has been several times done.' The author questions even the power of Congress, by joint resolution or otherwise, to direct the President to denounce a treaty, though such directions also have been given, and in some instances followed, though in others the direction has been successfully refused (statement issued by the Secretary of State, September 25, 1920). This conclusion would seem to be entirely in accord with the general spirit of the interpretation of the Constitution in this regard by the Supreme Court of the United States as indicated, for instance, by the case of *United States* v. *Curtiss-Wright*, 299 US, p. 304." (*Ibid.*, pp. 331-332.)

The 1939 termination of the 1911 commercial treaty with Japan is still another case of Presidential notice pursuant to a notice provision without violation by the other party, and without any conflicting statute or treaty. Impossibility of performance was not a relevant factor.

1944 Roosevelt Notice of Termination of Protocol to 1929 Inter-American Convention for Trade Mark and Commercial Protection

On September 29, 1944, the United States gave notice of denunciation of the Protocol accompanying the General Inter-American Convention for Trademark and Commercial Protection of 1929. Provision was made in the Protocol for denunciation on one year's notice. (2 Bevans 751; *TS* 833.) The Protocol provided for the registration of trademarks in an Inter-American Trademark Bureau at Havana, Cuba.

The notice of denunciation stated that as the result of the experience of the past several years, the US Government had concluded that the Trademark Bureau and Protocol had failed to serve any purpose which would adequately justify the annual quota of funds contributed by the United States to the Bureau. There was no prior or subsequent communication with the Senate or Congress. The Protocol ceased to be in force for the United States on September 29, 1945. (State Dept. Doc. 710.D4/7-1844, Sept. 29, 1944.)

In a letter dated September 29, 1944, to certain US diplomatic officers in the American Republics, Secretary of State Hull said that the US Government had decided to denounce the Protocol "in view of past ineffectiveness and absence of any evidence of future increased activity". (State Dept. Doc. 710.D4/9-2944, Sept. 29, 1944.)

The treaty could have been carried out; there was no violation; and there was no subsequent inconsistent statute or treaty.

1948 Truman Notice of Withdrawal from 1937 Whaling Convention

On December 30, 1948, the United States gave notice of withdrawal from the 1937 multilateral convention for the regulation of whaling. (3 Bevans 455.) The notice cited a general understanding at the 1946 whaling conference that the new convention (62 Stat. 1716; *TIAS* 1849; 4 Bevans 248) would completely replace the old agreement and protocol, and that there was an informal understanding by the delegates to the 1946 conference that after the 1946 convention entered into force the contracting parties to the earlier convention would withdraw therefrom. Neither the Senate nor the Congress was consulted in the matter.

Despite the fact that the 1946 convention constituted a comprehensive system for the regulation of whaling, and thus replaced the 1937 convention, it did not result in US termination of the 1931 convention on the same subject (49 Stat. 3079; *TS* 880; 3 Bevans 26) and that convention remains in force to this day.

Trade Agreements Extension Act of 1951

One of the few Congressional enactments during the last fifty years requiring the President to terminate a treaty came in the Trade Agreements Extension Act of 1951. (65 Stat. 72.) That Act provided that as soon as practicable the President should take the necessary action to deny the benefits of trade agreement concessions to imports from the Soviet Union and other communist countries. The commercial treaties with Hungary (8 Bevans 1117) and Poland (11 Bevans 237) respectively provided for most-favored-nation treatment in customs matters. Both treaties provided for termination on notice, one year in the case of Hungary, and six months for Poland.

Accordingly, on July 5, 1951, the Department of State addressed a note to each Government proposing modification of the treaty by termination of the most-favored-nation articles, and giving the required notice that if this proposal was not acceptable the treaty as a whole would terminate within the prescribed time. (Dept. of State Press Release 597, July 6, 1951.) Since neither Government agreed to the proposed modification, the treaties terminated at the end of the prescribed time period.

1952 Truman Notice of Termination of 1929 Convention on Safety of Life at Sea

Another case in which a subsequent treaty led to a Presidential notice of termination of an earlier treaty was the 1952 termination of the 1929 Convention on Safety of Life at Sea. (2 Bevans 782.) Article 66 of the 1929 Convention provided that it might be denounced within five years after its entry into force by a one-year notice.

The preamble to the 1948 Convention on the same subject recited that promotion of safety of life at sea "may be best achieved by the conclusion of a Convention to replace" the 1929 Convention. (*TIAS* 2495; 3 *UST* 3450.) The 1948 Convention entered into force on November 19, 1952. The notice of denunciation of the 1929 Convention was given by the United States on the same day without further reference to the Senate or the Congress.

Similarly, on May 26, 1965, the United States gave notice of denunciation of the 1948 Convention, pursuant to Article XII of that Convention, because it had been supplanted by the 1960 Convention for Safety of Life at Sea. (*TIAS* 5780;

16 *UST* 185.) The 1960 Convention entered into force for the United States on May 26, 1965.

1954 Eisenhower Notice of Withdrawal from 1923 Convention

On May 24, 1954, the United States gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise (*TS* 754; 33 *LNTS* 81). The Convention contained a provision for withdrawal on one-year's notice. The US notice was given without the prior or subsequent approval of the Senate or Congress. The withdrawal took effect for the United States on May 24, 1955.

It has been asserted that a fundamental change in circumstances resulting in impossibility of performance was invoked by the United States in announcing its withdrawal from the Convention. In fact, the United States did not invoke the fundamental change of circumstances doctrine, nor did it refer to impossibility of performance.

Under the 1923 Convention, the parties had agreed to employ the Brussels nomenclature of 1913 in their statistical reporting of international commerce, either exclusively or as a supplement to other systems. However, the Brussels system of 1913 had become outdated. In 1950 the United Nations developed what is known as the Standard International Trade Classification. Following this development was the adoption of the Uniform Central American Customs Nomenclature by the Committee on Economic Cooperation of the Ministers of Economy of Central America sponsored by the UN Economic Commission for Latin America. This nomenclature employed the Standard International Trade Classification as its basis. In 1950 the United Nations Economic and Social Council urged governments to use the Standard International Trade Classification.

Under these circumstances, the Tenth Inter-American Conference of American States, meeting at Caracas, Venezuela, in 1954, adopted Resolution LXXXVIII on Customs Nomenclature. The Resolution, after reciting the above history of the matter, made the following recommendation:

> "1. That, inasmuch as the Brussels nomenclature of 1913 has become outdated and has thereby rendered inapplicable the Santiago Convention on Uniformity of Nomenclature for the Classification of Merchandise, the ratifying Governments consider the desirability of withdrawing from the said Convention, as provided in Article V, in order that the Convention may be legally abandoned by all the parties.
>
> 2. That the Member States take cognizance of the method used in the development of the new Uniform Central American Customs Nomenclature, accomplished with the assistance of the United Nations and the Inter-American Statistical Institute, and seek to adopt and put in effect as soon as possible the Standard International Trade Classification of the United Nations, either exclusively or as a supplement to the national systems." (US Archives, 74D431.)

The US notice of withdrawal from the 1923 Convention simply quoted recommendation 1 of Resolution LXXXVIII, and said that "in accordance with the foregoing recommendation", the US Government was giving its notice of withdrawal. There was no mention of the fundamental change of circumstances doctrine or of impossibility of performance.

In fact the advance in nomenclature clearly did not render "impossible" the use of the "outdated" system. Advances in statistical reporting systems had been developed and these were deemed more desirable than the older systems. The Inter-American Conference therefore urged States to adopt and put into effect the newer systems. There was no question of impossibility or fundamental change of circumstances.

The case represents another instance of Presidential termination of a treaty by notice pursuant to a notice provision. There was no prior or subsequent approval by the Senate or the Congress. There was no violation, or inconsistent statute or treaty. Impossibility was not a relevant factor.

1962 Kennedy Notice of Termination of 1902 Commercial Treaty with Cuba

On August 21, 1962, the United States gave notice of termination of the 1902 commercial convention with Cuba. (*TS* 427; 6 Bevans 1106.) The notice was given pursuant to a one-year notice provision in the convention. At the same time the United States gave notice of termination of the 1934 reciprocal trade agreement with Cuba. (49 Stat. 3559; EAS 67; 6 Bevans 1163.) This was an Executive agreement. Both of these agreements had been suspended on October 30, 1947, by an Executive agreement between the United States and Cuba (6 Bevans 1229) which expressly declared that both agreements would be "inoperative" for as long as the United States and Cuba remained parties to the General Agreement on Tariffs and Trade. (GATT) (*TIAS* 1700.)

It has been asserted that the termination was a formality mandated by a national policy, adopted by Congress, expressed in the Foreign Assistance Act, the Export Control Act, the Trading with the Enemy Act, the Mutual Assistance Act, the Cuban Resolution of 1962, and the Punta del Este Agreement of 1962.

However, the United States also terminated other trade agreements with friendly European countries at the same time because of the GATT negotiations that had recently been completed. In approving the recommendations of the Interdepartmental Committee on Trade Agreements (TAC) on the conclusion of the 1960-1961 Geneva tariff negotiations, President Kennedy approved the completion of steps for the termination of several suspended bilateral trade agreements with friendly countries which were proposed in such recommendations. Aside from Cuba, agreements with the Belgo-Luxembourg Economic Union, the United Kingdom, France and the Netherlands were also terminated at the same time. (See, e.g., 13 *UST* 1786, the 1962 termination of earlier trade agreements with the United Kingdom.)

The President's action in giving notice of termination of the 1902 commercial treaty with Cuba was thus taken in a broader context than punitive measures against Cuba. While it is not possible to prove the point, the termination would probably have taken place even had relations with Cuba been friendly.

Put most accurately, the GATT was a subsequent executive agreement, which, along with the executive agreement of October 30, 1947, effectively and legally suspended the operation of the 1902 commercial treaty with Cuba. The final termination of the 1902 treaty was consistent with Congressional enactments, but was not required by them. We have found no evidence that the Congress or Senate addressed the issue or thought at all about authorizing or directing the President to terminate the 1902 treaty. The termination of that treaty was part of a larger program of terminating certain commercial agreements, even with friendly governments, as part of the GATT process, by means of Executive action.

1965 Johnson Notice of Termination of the Warsaw Convention

On November 15, 1965, the United States gave notice of denunciation of the 1929 Convention for the Unification of Certain Rules relating to International

Transportation by Air and the Additional Protocol relating thereto, known as the Warsaw Convention. (49 Stat. 3000; *TS* 876; 2 Bevans 983.) The notice was given pursuant to a six-months notice provision contained in Article 39 of the Convention. The notification was withdrawn on May 14, 1966, just one day before the six-months notice period would have expired.

The President's notice of termination, as well as the withdrawal of the notice, did not receive any prior or subsequent approval from the Senate or the Congress. There was no violation of the convention, no subsequent inconsistent statute or treaty, and impossibility of performance was not a factor. The sole reason for giving the notice of termination, as expressed in the official US notice, was "the low limits of liability for death or personal injury" provided in the Convention. (Dept. of State Press Release No. 268, Nov. 15, 1965.)

Hearings were held on the matter by the Senate Foreign Relations Committee, but at no time did the manner of withdrawal become an issue. Many witnesses at the hearings, including attorneys, professors, deans and representatives of lawyers' associations, testified in favor of US withdrawal from the Convention, but it was not suggested that this could be done only with the approval of the Senate or the Congress.

The Senate Foreign Relations Committee itself recommended notice of withdrawal, but did not suggest that the President's notice required the prior or subsequent approval of the Senate or Congress. The Committee said that unless a complementary insurance program was enacted within a reasonable time (which meant prior to the adjournment of the 89th Congress), "the Department of State should take immediate steps to denounce the Warsaw Convention and the Hague Protocol". (S. Exec. Rept. No. 3, 89th Cong., 1st Sess., app. p. 7.) No action was taken by the Senate or Congress, and there were no contentions, as far as we have been able to determine, in the Senate or the Congress that the President alone could not give the notice of denunciation without Senate or Congressional approval.

There was one interchange at the Foreign Relations Committee hearings (between Senator Carlson and a witness who favored denunciation) on the method of giving notice:

> *Senator Carlson:* Mr. Speiser, you suggest that we denounce . . . the Warsaw Convention.
>
> *Mr. Speiser:* Yes.
>
> *Senator Carlson:* That gets to be an Executive act, I think, and only the President can do that, isn't that correct?
>
> *Mr. Speiser:* I have discussed this with the State Department and apparently the United States has denounced treaties in two ways, either by the President alone and the Senate.
>
> *Senator Carlson:* I would assume that the Senate, of course, could advise the President by resolution. We probably could cut off funds and we probably have other methods, but personally, I would feel that it would be an Executive act. (*Hearings on the Hague Protocol to the Warsaw Convention* before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess., 1965, Pt. 2, p. 42.)

In fact on May 3, 1966, when it was known that the Department of State might withdraw its notice of denunciation, a resolution (S. Res. 256, 89th Cong.) was introduced requesting that the notice *not be withdrawn* until full public hearings were held. The original sponsors of the resolution were Senators Nelson, Hartke, Kennedy of New York, Montoya and Yarborough. While the resolution was sponsored by 29 Senators, the Administration withdrew the notice before the Senate took action on the resolution.

In brief, there was no indication from the Senate, including the Foreign Relations Committee, or from the House, that the President could not give the notice without Senate or Congressional approval. As noted, there was no treaty violation, no subsequent inconsistent statute or treaty, and impossibility was not a factor. The case stands as a clear example of Presidential notice of termination without Senate or Congressional approval, and without Senate or Congressional objection.

1975 Ford Notice of Withdrawal from the International Labor Organisation

On November 5, 1975, Secretary of State Kissinger gave notice of intention to terminate United States membership in the International Labor Organisation. The notice became effective, pursuant to the provisions of Article 1 (5) of the ILO Constitution, two years later. The Carter Administration affirmed the withdrawal, did not extend the two-year time period after considering that step, and thus withdrew the United States from the ILO in November 1977. There was no prior or subsequent approval by the Senate or the Congress.

The United States membership in the ILO was not authorized by treaty, but rather by a joint resolution of Congress approved by the President on June 19, 1934. (S.J. Res. 131, Public Res. 43, 73d Cong.) Nevertheless US adherence to the ILO Constitution constituted an extremely important international obligation which included membership in an international organization. Yet termination was accomplished without Congressional approval, and as far as we have been able to determine, the issue of Congressional approval was not raised in either House of the Congress, despite the fact that a number of members of the Senate and House did not favor US withdrawal from the ILO.

1976 The Fishery Conservation and Management Act

The most recent treaty terminations by the United States have been pursuant to the Fishery Conservation and Management Act of 1976. (P.L. 94-265.) Section 202 *(h)* of the Act provides that "it is the sense of the Congress" that the United States shall withdraw from any treaty that is not renegotiated within a reasonable time so as to conform with the purposes, policy and provisions of the Act.

Pursuant to this provision, the United States gave notice of intention to withdraw from the 1949 International Convention for the Northwest Atlantic Fisheries (*TIAS* 2089; 1 *UST* 477) on June 22, 1976, effective December 31, 1976. The United States also gave notice of termination of the 1953 convention with Canada for the preservation of the halibut fishery of the Northern Pacific Ocean and Bering Sea (*TIAS* 2900; 5 *UST* 5) on April 1, 1977, effective April 1, 1979; and the 1952 convention for the high seas fisheries of the North Pacific Ocean (*TIAS* 2786; 4 *UST* 380) on February 10, 1977, effective February 10, 1978.

22. Statement of Abram Chayes, Harvard University, Cambridge, Massachussetts, Treaty Termination, Hearings Before the Committee on Foreign Relations, United States Senate, Ninety-sixth Congress, First Session, 9, 10 and 11 April 1979, pp. 306-312

Mr. Chayes. Thank you, Mr. Chairman and Senator Javits. I am going to compress my prepared statement somewhat. I hope it can appear in full in the record.

Senator Zorinsky. It will appear in its entirety in the record.

Mr. Chayes. First, let me say it is a pleasure and honor to be testifying again before the Committee. I am glad that the Committee is conducting this inquiry. It is important to reexamine received wisdom from time to time to see how it withstands the impact of changed circumstances and new thinking.

TERMINATION OF TREATIES MATTER OF PRESIDENTIAL POWER

As legal adviser, I accepted, and as professor, I taught the received wisdom that the determination of treaties was a matter of Presidential power. But I must confess that I did so primarily on the basis of the conclusions of text writers, without myself making an independent examination of the underlying materials.

I have now made a more careful review of those materials in preparation for this testimony. I am glad to say that I have not been seriously misleading the young. In particular, I conclude that, as a general matter and particularly as to the mutual defense treaty with the Republic of China, the President has authority to give effective notice of termination in accordance with the terms of the treaty. But the situation is somewhat more complicated than I had supposed. And perhaps it would be helpful to go through my thinking about it.

TERMINATION OF TREATY IN ACCORDANCE WITH TERMS

First, let me say I am not talking about the whole range of questions that the committee is inquiring into. The staff asked me to focus my remarks on termination of treaties, and I am narrowing it somewhat further to termination of a treaty in accordance with its own terms.

Second, let me say I don't believe the courts are going to be very much help to us in this matter. There have only been a few cases in our history that even remotely bear on the question of termination, and they don't answer any of the important questions.

And I don't think that Senator Goldwater and his coplaintiffs are going to change that very much.

Third, two centuries of practice have provided something less than decisive illumination on this problem. In the first place, there is not all that much practice. There are less than 30 instances of treaty termination in our history. And on the whole, with the exception of the treaties of alliance with France and with one or two others, these instances have not involved major political treaties or even, for the most part, significant foreign policy issues.

So that although questions of institutional power have sometimes been touched on, they have never been focused and contested sharply.

I don't think much would be gained by my reviewing these 25 or 30 historical cases once again. I have not made an independent investigation of the original materials, but it is clear from the secondary accounts that all of them are complex enough to sustain differing interpretations.

NO UNIFORM PRACTICE

To my mind, the most important thing that a review of the practice reveals is that there has been no uniform practice. The record shows all sorts of combinations and permutations of Presidential and congressional action, and it shows some instances of action by the President alone.

In all of these cases and whatever the form chosen, the action has been regarded as effective by our treaty partners, by the Executive branch, by the Congress so far as it appears, and in the few peripheral instances already referred to, Mr. Chairman, by the courts.

Is there anything in the language and structure of the Constitution that contradicts the catholicity of this conclusion? Not that I can find.

The key question here, I take it, is whether the President can act on his own in the first instance to give notice of termination without securing some form of Congressional approval in advance. I put aside, once more, the issue of what he could do in the face of contrary Congressional action.

SYSTEM OF CHECKS AND BALANCES

We know that there are checks and balances—divided power—in the Constitutional scheme both as to domestic and foreign affairs. But it is also true that the initiative is differently allocated as to each. Congress makes the laws, subject to Presidential veto. But the President makes treaties, subject to the concurrence of two-thirds of the Senate. This basic distinction is backed up in many ways.

The President receives ambassadors, and thus determines what countries and régimes the United States recognizes. On a whole range of subjects, the President can make agreements without formal Congressional participation, and so on. These arrangements are thought to reflect the superior availability of information to the Executive and the need for unity, dispatch and flexibility in the conduct of foreign affairs.

Congress, of course, has its balancing power. In addition to the advice and consent of the Senate in the case of treaties, there is often the need for implementing legislation, and, increasingly in these days, appropriations to carry out foreign engagements undertaken by the President. But these are essentially negative, revisory powers. They provide a check, but they leave the initiative with the President.

The structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent Presidential initiative in treaty termination.

As Professor Oliver just pointed out, it is hard to say; and as Professor Lowenfeld has pointed out, it is hard to say just what form of Congressional concurrence would be required. Some have said that the authorization might come by a majority vote of both Houses of Congress, as with the repeal of ordinary legislation.

But, although a treaty, like a statute, is the supreme law of the land, it becomes so not by enactment of Congress but by the President's act of ratification, after the advice and consent of the Senate only. It seems anomalous that, if legislative concurrence is required for termination, it should be from a different legislative organ than is required for making a treaty.

TERMINATION BY TWO-THIRDS VOTE

Senatorial partisans argue for concurrence by two-thirds of the Senate, just as with advice and consent to treaties. That sounded unnatural to me when I first heard it, and it sounds only slightly less so now, after I've thought about it for a while.

If we think about the purpose of extraordinary majority requirements, we find they are most often used to insure circumspection, caution, and broad consensus in undertaking serious and extraordinary engagements. This has led some to suggest that the framers stipulated for advice and consent of the Senate for treaty making but not termination, because they fear getting into entangling alliances but not getting out of them.

Senator JAVITS. If I may appeal to the Chair, I have been called to the floor, and, if you will excuse me, I have to leave, but I do have a monitor here so that I can be kept abreast of what you are saying. I offer my humble apologies.

Mr. CHAYES. Thank you. You have been very attentive and interesting in your own comments, Senator. As I said, I think the argument that the Framers were worried about getting into entangling alliances but not getting out of them a bit too easy.

We are increasingly aware that the differences between commission and omission may not be as great as once it was thought. In many cases, and the President is one, termination of a treaty may involve as serious, as extraordinary, and as fundamental a shift in foreign policy as the conclusion of an alliance.

In the last analysis, I reject the notion of Senate concurrence by a two-thirds vote because the requirement of action by an extraordinary majority means the possibility of veto by a minority, acting against the will of the majority. That is a sufficient departure from our usual way of doing things that, in my view, it should not be expanded beyond the cases where it is expressly specified.

It is worth looking at the cognizant areas of war powers where the Constitutional position of Congress is a good deal stronger than as to foreign affairs in general; there, a decade of debate has failed to resolve the Constitutional issue in favor of a requirement of advance approval by Congress.

The present consultative procedures are defined not by the Constitution, but by the War Powers Resolution, and even that does not require affirmative concurrence by Congress in every case within its purview.

The exercise of the war power seems to me a stronger case for advance Congressional approval than treaty termination. The President, by deploying troops, can present Congress with an irrevocable fait accompli. By contrast, when the President gives notice of his intention to terminate a treaty there is, in almost every case, a period before the termination becomes final in which the Congress can take whatever action it deems necessary to affect the outcome.

That need not take the form of a Congressional "countermand" to the Presidential notice. In this very case of the mutual defense treaty, Congress has been able to devise and force the President to accept a stronger and much more public commitment to the security of Taiwan than he seemed at first to be willing to make.

POSSIBILITIES FOR LEGISLATIVE PARTICIPATION IN TREATY TERMINATION

There are other possibilities for legislative participation in the treaty termination process. A stipulation to that effect in the Senate resolution of advice and consent would, I believe, be valid. General legislation analagous to the War Powers Resolution might also be possible, but seems to me uncalled for. Treaty termination has not been a serious problem in our history, and experience does not suggest it needs or is susceptible to uniform treatment.

The kinds of treaties and the kinds and occasions for their modification are too various. The value of flexibility in the termination process is exemplified by the Republic of China case, touching, as it does, both the recognition power of the President and his role as Commander in Chief.

Suppose Congress by resolution should direct the President to withdraw a notice of termination? That is what President Roosevelt called an "iffy" question. If the President were to disregard a joint resolution overriding his veto we would clearly, as everybody before me recognized, be in the midst of a full-scale Constitutional crisis. But it is hard to imagine any such case arising.

The Constitutional system of checks and balances was not intended to produce impasse but to provide each branch with the leverage necessary for the practical accommodation of interests that is the essence of democratic government. That is in fact what has happened with the treaty termination process.

That is the real meaning of the confusing and varied "practice" in this area. In every case, a way has been found to associate both the executive and legislative branches with significant acts of treaty termination.

The cases of mixed termination action, whether the President or Congress moved first, were just such demonstrations of unity through concurrence. And if the truth be told, the cases cited as examples of the President acting alone are really examples of Congressional acquiescence, not Presidential assertions of power made good over Congressional resistance.

That is as it should be. The Constitution is "an instrument of government designed to endure for ages".

I find it hard to make the kind of categorical assertions about the powers that it grants that some of my colleagues have. It must necessarily leave a good deal of room for play in the joints.

On issues of this kind, what is important is not so much the precise legal distribution of power as the practical and effective distribution of power.

In the matter of treaty termination, as in so much else, the Constitution has provided ample opportunity for both branches to exert effective influence over the policy process.

Thank you.

[Mr. Chayes prepared statement follows:]

Prepared Statement of Professor Chayes

Mr. Chairman, members of the Committee. My name is Abram Chayes. I am a professor at the Harvard Law School, where I teach, among other things, international law. From 1961 to 1964, I was the Legal Adviser of the Department of State. It is a pleasure and an honor to be testifying again before this Committee.

I am glad that the Committee is conducting this inquiry. It is important to reexamine received wisdom from time to time to see how it withstands the impact of changed circumstances and new thinking.

As Legal Adviser I accepted and as professor I taught the received wisdom that the termination of treaties was a matter of Presidential power. But I must confess that I did so primarily on the basis of the conclusions of text writers, without myself making an independent examination of the underlying materials.

I have now made a more careful review of those materials in preparation for this testimony. I am glad to say that I have not been seriously misleading the young. In particular, I conclude that, as a general matter and particularly as to the Mutual Defense Treaty with the Republic of China, the President has authority to give effective notice of termination in accordance with the terms of the Treaty. But the situation is somewhat more complicated than I had supposed. And perhaps it would be helpful to go through my thinking about it.

Let me establish some propositions at the outset:

First, I am not talking about abrogation or denunciation, much less breach of treaty obligations by the United States. The issue is the termination of a treaty in accordance with its own terms. As for out-and-out abrogation, it appears that this was done only once in our history, in 1798, as to treaties of Friendship and Alliance with France. It was done by an Act of Congress, signed by President Adams, and regarded by all parties, including the courts, as tantamount to a declaration of war. As to breach of a treaty, it is not the United States Constitution, but the other treaty partner that determines what acts of what official organs it will regard as a breach.

But termination in accordance with the terms of the treaty accounts for most of the historical instances cited by both sides in this debate. Most modern treaties contain such provisions, in contrast to those of a century ago, which did not. This contemporary practice reflects the experience of countries that conditions change, not even the most far-seeing statesman can anticipate the course of events, and in any case, a treaty that doesn't embody a fair accommodation of the interests of the parties as currently perceived is not worth much.

Second, the courts are not going to be much help in resolving this issue. In 200 years only the barest handful of cases have touched on the problem of treaty termination and then only in the most peripheral and elliptical way. Political treaties, like the Mutual Defense Treaty with the Republic of China, have substantially no domestic law impacts, so the chances for court interpretation are not good. My guess is that Senator Goldwater and his co-plaintiffs are not going to change that.

Third, two centuries of practice have provided something less than decisive illumination of the problem. In the first place, as might be expected, there is not all that much practice. Although there are minor differences about what count, there seems to be general agreement that there have been less than 30 instances of treaty termination in our history. Then, on the whole, with the exception of the treaties with France already mentioned, these instances have not involved major political treaties, or even, for the most part, significant foreign policy issues. Primarily, they concern technical and commercial treaties — load line conventions, tariff nomenclature, extradition and the like. As a result, although questions of institutional power have sometimes been touched on, they have never been focussed and contested sharply. In particular, what might be thought the hardest, testing questions have simply never arisen: can Congress compel an unwilling President to give notice of termination. Conversely, can the President persist in a decision to give notice as against a duly enacted legislative command to the contrary. I shall touch on these questions briefly in a moment, but, as we shall see, it seems to me highly unlikely that they would ever arise as a practical matter.

I don't think much would be gained by my reviewing the 25-30 historical cases once again. I haven't made an independent investigation of the historical materials, and it is apparent from the secondary accounts that all of them are complex enough to sustain differing interpretations. Proponents of Presidential power stress the more recent period since World War I, when the cases that can fairly be characterized as actions by the President alone are concentrated. In a sense, that is fair, because this is the era in which the United States has been a world power. It has been a time of vast expansion in our treaty relations. In a count we made for our book about ten years ago, my co-authors and I calculated that from the Declaration of Independence to World War I, the United States became a party to about 700 treaties and other international agreements. In the two interwar decades, the number was about 600. And since World War II, there have been more than 4,000. All of these, of course, were not treaties in the constitutional sense, but I think the proportions are about right. On the other hand, this same recent period is the period of the expansion of presidential power at the expense of Congress, a growth that we are in the process of re-examining and, perhaps, revising.

To my mind the most important thing that a review of the practice reveals is that there has been no uniform practice. The record shows all sorts of combinations and permutations of Presidential and Congressional action; and it shows some instances of action by the President alone. In all these cases, and whatever the form chosen, the action has been regarded as effective — by our treaty partners, by the Executive branch, by the Congress so far as appears, and, in the few peripheral instances already referred to, by the courts.

Is there anything in the language and structure of the Constitution that contradicts the catholicity of this conclusion? Not that I can find. The key question here, I take it, is whether the President can act on his own in the first instance to give notice of termination without securing some form of Congressional approval in advance. I put aside, once more, the issue of what he could do in the face of contrary Congressional action.

We know that there are checks and balances — divided power — in the Constitutional scheme both as to domestic and foreign affairs. But it is also true that the initiative is differently allocated as to each. Congress makes the laws, subject to Presidential veto. But the President makes treaties, subject to the concurrence of two-thirds of the Senate. This basic distinction is backed up in many ways. The President receives ambassadors, and thus determines what countries and régimes the United States recognizes. On a whole range of subjects the President can make agreements without formal congressional participation. And so on. These arrangements are thought to reflect the superior availability of information to the Executive and the need for unity, despatch and flexibility in the conduct of foreign affairs.

Congress, of course, has its balancing power. In addition to the advice and consent of the Senate in the case of treaties, there is often the need for implementing legislation and, increasingly in these days, appropriations to carry out foreign engagements undertaken by the President. But these are essentially negative, revisory powers. They provide a check, but they leave the initiative with the President. Congress cannot compel him, for example, to negotiate a treaty or even to ratify once the Senate has given its advice and consent. There is nothing comparable to the legislative override of a Presidential veto.

The structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent Presidential initiative in treaty termination. I confess I am fortified in this conclusion because, as my friend Professor Lowenfeld has pointed out, it is hard to say just what form of Congressional concurrence would be required. Some have said that the authorization might come by a majority vote of both Houses of Congress, as with the repeal of ordinary legislation. But, although a treaty, like a statute, is the supreme law of the land, it becomes so not by enactment of Congress but by the President's act of ratification, after the advice and consent of the Senate only. It seems anomalous that, if legislative concurrence is required for termination, it should be from a different legislative organ than is required for making a treaty.

Senatorial partisans argue for concurrence by two-thirds of the Senate, just as with advice and consent to treaties. That sounded unnatural to me when I first heard it, and it sounds only slightly less so now, after I've thought about it for a while. In the cases after *Myers*, when it appeared that there were some limits on the removal power, it was never suggested that the President should have power to remove an officer provided the Senate agreed. What was urged was some constraint on the President's power — not the approval of the Senate or Congress but a requirement, for example, of just cause for removal to be determined in the first instance by the President, subject perhaps to court review.

If we think about the purpose of extraordinary majority requirements, we find they are most often used to insure circumspection, caution and broad consensus in undertaking serious and extraordinary engagements. This has led some to suggest that the Framers stipulated for advice and consent of the Senate for treaty making but not termination, because they fear getting into entangling alliances but not getting out of them. That is, perhaps, a bit too easy. We are increasingly aware that the difference between commission and omission is not as great as may once have been thought. In many cases, and the present is one, the termination of a treaty may involve as serious, as extraordinary and as fundamental a shift in foreign policy as the conclusion of an alliance.

In the last analysis, I reject the notion of Senate concurrence by a two-thirds vote because the requirement of action by an extraordinary majority means the possibility of veto by a minority, acting against the will of the majority. That is a sufficient departure from our usual way of doing things that, in my view, it should not be expanded beyond the cases where it is expressly specified.

These problems with the form of approval, though instructive, could surely be manged if there were some good reason to read the Constitution as containing a requirement of concurrence in treaty termination. In the cognate area of the war powers, where the Constitutional position of Congress is a good deal stronger than as to foreign affairs in general, a decade of debate has failed to resolve the Constitutional issue in favor of a requirement of advance approval by Congress. The present consultative procedures are defined, not by the Constitution, but by the War Powers Act, and even that does not require affirmative concurrence by Congress in every case within its purview.

The exercise of the war power seems to me a stronger case for advance Congressional approval than treaty termination. The President, by deploying troops, can present Congress with an irrevocable fait accompli. By contrast, when the President gives notice of his intention to terminate a treaty there is, in almost every case, a period before the termination becomes final in which the Congress can take whatever action it deems necessary to affect the outcome. That need not take the form of a Congressional "countermand" to the Presidential notice. In this very case of the Mutual Defense Treaty, Congress has been able to devise and force the President to accept a stronger and much more public commitment to the security of Taiwan than he seemed at first to be willing to make.

There are other possibilities for legislative participation in the treaty termination process. A stipulation to that effect in the Senate resolution of advice and consent would, I believe, be valid. General legislation analogous to the War Powers Act might also be possible, but seems to me uncalled for. Treaty termination has not been a serious problem in our history, and experience does not suggest it needs or is susceptible to uniform treatment. The kinds of treaties and the kinds and occasions for their modification are too various. The value of flexibility in the termination process is exemplified by the Republic of China case, touching, as it does, both the recognition power of the President and his role as Commander-in-Chief.

Suppose Congress by resolution should direct the President to withdraw a notice of termination? That is what President Roosevelt called an "iffy" question. If the President were to disregard a joint resolution overriding his veto we would clearly be in the midst of a full-scale Constitutional crisis. But it is hard to imagine any such case arising.

The Constitutional system of checks and balances was not intended to produce impasse but to provide each branch with the leverage necessary for the practical accommodation of interests that is the essence of democratic government. That is in fact what has happened with the treaty termination process. That is the real meaning of the confusing and varied "practice" in this area. In every case, a way has been found to associate both the executive and legislative branch with significant acts of treaty termination. The effect of the present arrangements is that a major policy initiative involving termination of treaty cannot take place without the concurrence or acquiescence of both branches. The cases of mixed termination action, whether the President or Congress moved first, were just such demonstrations of unity through concurrence. And if the truth be told, the cases cited as examples of the President acting alone are really examples of Congressional acquiescence, not Presidential assertions of power made good over Congressional resistance.

That is as it should be. The Constitution is "an instrument of government designed to endure for ages". As such it must necessarily leave a good deal of room for play in the joints. On issues of this kind, what is important is not so much the precise legal distribution of power as the practical and effective distribution of power.

In the matter of treaty termination, as in so much else, the Constitution has provided ample opportunity for both branches to exert effective influence over the policy process.

Senator ZORINSKY. Thank you, Professor.

23. QUESTIONS TO AND ANSWERS BY ABRAM CHAYES, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 327-333

Senator ZORINSKY. Thank you, Mr. Meeker.

I would like to call on my colleague, Senator Helms, and ask him if he has any questions.

Senator HELMS. Mr. Chairman, I really don't have any questions.

I want to compliment both gentlemen for excellent statements.

CONSTITUTIONAL TWILIGHT ZONE

I judge what both of you are saying is that since the Constitution is silent on the specific issue of treaty termination, that this is really in a constitutional twilight zone?

Mr. CHAYES. Well, I would say that.

I would say that neither the Constitution nor the practice nor the courts nor the judicial materials give us enough material to make any kind of categorical statement about this. And I would say in such a case it seems to me there is likely to be, or to be worked out some sharing of power as a practical matter.

But I think the situation is that the President can start the process by giving notice. Then there is a period in all of these cases before the notice becomes effective. That period gives time for Congress to do what it likes. And in this case, it did alter the significance of the termination of that treaty quite substantially in the legislation that it passed with respect to Taiwan.

Mr. MEEKER. I would differ just a bit. I think the constitutional power to terminate does reside with the President, but that as a matter of good policy and sound administration he ought to consult with the Congress on an important issue such as this before making a decision. That is not, in my view, a constitutional requirement but rather simply sound policy.

CONSTITUTIONAL AMENDMENT ON TREATY TERMINATION

Senator HELMS. I certainly agree, being a cosponsor of the Byrd resolution.

Do you think it is a mistake for Congress to consider a Constitutional amendment which would stipulate that there must be a working relationship on such matters?

Mr. MEEKER. I think, as Mr. Rogers has said, that this is not a very large practical issue for the United States, and indeed has not been in our history. And it seems to me that the present Constitutional arrangements, though not explicit on this point, are perfectly satisfactory, and that Congress and the President can work cooperatively under them.

To try to frame a Constitutional amendment on the subject could well produce confusion or something worse. I would not favor a Constitutional amendment.

Mr. CHAYES. I would agree with that almost precisely. There is very little to add.

Essentially, we have had 20 or 25 cases in history of treaty termination. None of them have even risen to the level of public notice that this one did. And in all of them, as Mr. Meeker has said, whatever the abstract legal distribution of powers may be, in all of them it was possible to work out some accommodation between the two branches so that the ultimate action reflected, in a broad sense, the public policy of the United States.

Senator HELMS. So what both of you are saying in effect is what some of us at Congress have been saying: It would have been exceedingly beneficial had there been consultation and understanding prior to the act of terminating the treaties with Taiwan.

It has been suggested I ask you what legal significance would each of you give to a Senate resolution on the subject of treaty termination, in light of the Senate's Constitutional powers in the treaty area. I think you have responded to that.

Mr. Chairman, these two gentlemen answered all of the questions that came to mind as they went along.

And I again want to commend you both on excellent statements. I thank you for appearing. I know you did so at some sacrifice to yourselves in terms of time.

Senator ZORINSKY. Thank you, Senator.

SIMILARITY BETWEEN SALT AND MUTUAL DEFENSE TREATY

I would like to ask a question. In your opinion, either Mr. Meeker or Professor Chayes, I would like to ask your opinion as to whether you classify this in the same category as the Strategic Arms Limitation Treaty. Would the President have an equal ability to unilaterally cancel that treaty or a disarmament treaty of any kind? Is this the same in your mind as a mutual defense treaty?

In other words, is there a separation of categories between treaties, or do you treat them all as a single class?

Mr. CHAYES. Well, I have not made distinctions, although it does seem to me that the process might be different in different kinds of cases.

An arms control treaty, most of the arms control treaties we now have, I think all of them provide for withdrawal on notice after some months—I think 3 is the shortest period, where the supreme interests of the Nation are jeopardized. And there again it would seem to me that, as Mr. Meeker and I have both said, and I think everybody has said, it would be very important to have as extensive consultation as time permitted to do that.

But I would think the President could start the 3 months running by giving notice, Mr. Chairman, without getting any formal vote of a legislative body.

Now, what would happen if the legislative body acted thereafter, within the 3-month period, as I said, I think is somewhat cloudy. I guess you would say it is the cloudy area of Constitutional understanding.

Now, if you had a treaty that gave rise to private rights, for example, a trade agreement where the Congress changed something after the President gave notice, there you might get a judicial determination. You might also say that where private rights were created, the desirability of some Congressional action was larger. But I think that, more or less as a Constitutional matter, that both parties, both the Executive and the legislative branches have the authority to move. And it is up to them to exercise the authority on the basis of their political judgment, as to what the situation requires.

Senator ZORINSKY. Thank you.

Mr. Meeker?

Mr. MEEKER. I do not see a basis for distinguishing among treaties with respect to termination.

It seems to me the President has the constitutional authority to terminate regardless of the character of the treaty. In the case of the disarmament treaty, just as in the case of the treaty with the Republic of China, it seems to me consultation beforehand is important.

With respect to treaties that involve private rights and which might come into litigation in US courts, I would not see really a basis there either for concluding that such a treaty could be terminated only with the consent of Congress or the participation of Congress.

Such a treaty was an issue a few years ago — the Warsaw Convention — which limits in my mind rather undesirably, Mr. Chairman, the recovery that passengers or their legal representatives may make against airlines as the result of injury or death in international flights. The United States during the administration of President Johnson gave a notice of termination because of dissatisfaction with the existing low limits.

I was legal adviser at the State Department at the time and thought that that notice was correct and believed that it should have been maintained. Subsequently, the notice was withdrawn when the airlines were prepared to raise somewhat the limit of liability, but to leave it still very limited.

If the notice had been maintained, and if Congress had indicated a disagreement and had voted a resolution to maintain the treaty in force, I do not think the treaty should have been considered to remain in force.

It seems to me the President did have the authority to terminate it and his action would have been effective even if Congress had expressed itself in the contrary sense.

Mr. Chayes. The Warsaw Convention case is an interesting case.

I was Mr. Meeker's predecessor as legal adviser, and I started the process of denunciation of the Warsaw Convention, and he carried it out. But that is a very good illustration, I think of what happened.

I think Mr. Meeker is right that the President had power to give notice. I think it also true that if the period of notice had expired without anything else having happened, the treaty would have been terminated, and we would no longer have been subject to its obligations.

The fact is that the notice was withdrawn because a compromise was reached between, on the one hand, the air carriers, and, on the other hand, the administration. And you know if there was that kind of compromise that Congress was in there somewhere. And of course, they were. That is, it was an informal compromise; it did not come to a vote, but the concerned representatives of the Congress also expressed satisfaction with the compromise — whether it was right or wrong, the compromise, we can argue about that.

But in fact, the President did withdraw. And part of the reason for withdrawing was there was a Congressional interest that was expressed in pretty clear terms, and that was part of the mix.

What would have happened if they had come to a head and the Congress had passed a joint resolution directing him to withdraw the notice or reciting that the treaty would remain in force despite the notice, and had passed a joint resolution over Presidential veto? I do not think any of us here can say because it has never happened. And I don't think it likely to happen.

That kind of case might have gotten to the courts because then the next international air crash, Mr. Chairman, the question would have been: Were the carriers subject to any limitation of liability or not? And that is the kind of case a court can really deal with.

But we have never been close to that kind of a head-on collision about treaty termination because there are enough ways for the Congress to exercise its influence so that you don't need to worry about that last step.

Senator Helms. I have one question that comes to mind. Do you feel the

President can demand a treaty by means of an Executive agreement or parallel declaration of understanding after the treaty has received the advice and consent by the Senate?

Mr. CHAYES. Well, that is one of the most difficult questions. And I take a lot of this up with students, and it is very difficult because the treaties always have general provisions in them like any other enactment, any other law.

And the question is: How do you interpret them? And there are usually a range of possibilities for interpreting them. So the question of: What is a motor vehicle? Does it include trucks? Does it include the trailers or just the tractors? And things of that kind, and much more important things, come to the point where one might say, just as you say about a lot of legislation, if the Senate had known that is what the courts were going to say when they passed it, they would have done something different.

So there is that kind of broad range of interpretation. The particular case you refer to, I think, is the question of the SALT agreement where both parties announced unilaterally that they would continue to abide by the limits. That is a rather interesting matter, as you know, because the Arms Control Act provides that we shall not enter into arms control agreements without submitting them either to the Congress for majority approval of both Houses, or to the Senate by way of treaty.

In this case, this is another example of where the President went to the Senate and consulted with the persons principally involved. It was known in advance that this consultation was being forwarded. Then he secured the agreement of the principally concerned Senators.

In those circumstances, I would not think there is anything improper about that action. The policies that the President said he was going to continue were all policies that were within his authority as President to continue or alter as he chose. And he made a policy statement saying he was going to continue them. And I suppose that was within his power.

If you recall, way back in the Eisenhower administration, we had the first moratorium on testing. That was exactly the way it was established. President Eisenhower said he would not test as long as the Soviets did not test. Then the Soviets said they would not as long as we did not test. That went along until September 1961 when, as you recall, the Soviets broke that moratorium, and we felt free to test then ourselves.

But there was a period within which, without a formal agreement, Mr. Chairman, both parties pursued a reciprocal policy. And I think the President was within his powers in doing that since he was not doing anything that was not within his power to do regardless of what the Soviet Union did or did not do; he could have tested or not tested, as he chose.

LEGISLATING BY INTERPRETATION

Senator HELMS. There are some of us around here who feel that the various agencies do a whole lot of legislating by interpretation anyhow.

Mr. CHAYES. Oh, yes.

Senator HELMS. Mr. Meeker, do you have a comment?

Mr. MEEKER. I just know that parallel declarations raise the issue as to whether the parties to them do intend to make any agreement or not.

They may not intend to make an international agreement between themselves. I think the President of the United States does have a very wide authority, though, to make an executive agreement on his own constitutionally.

Mr. CHAYES. I would just say one further thing. The World Court has held that a unilateral declaration by a country I think this was in the case of Thailand, the *Temple* case a unilateral declaration by a country, not reciprocal in any sense, if it is intended to create an obligation, will do so. There is no principle of consideration for binding contracts and/or *quid pro quo* in international law.

A formal unilateral declaration by a country intending that it be relied on as an obligation-creating declaration, Mr. Chairman, will be effective to do so, according to the World Court.

UNILATERAL AGREEMENT OF SALT IS DEFEATED

Senator ZORINSKY. Professor, then in your estimation do you feel that if SALT were defeated, the President could still turn around and make a unilateral agreement that would be binding?

Mr. CHAYES. He could make a statement as to what his policy would be. And in the SALT case, of course, it is distinguished from the ordinary case because there is a special requirement in the arms control legislation that we don't make any agreements that are not submitted to the Congress or to the Senate.

So whatever his powers to make an Executive agreement are without legislative concurrence in the absence of such a statute, I think that statute displaces his power to make an agreement as to arms control policy.

On the other hand, he could say: "I'm not going to go through the SALT ceilings as long as I am President." And then we would be back in the impoundment problem, and all of that, if the Congress were to direct him, let us say, to build additional missiles, or something of that kind, and pass such an act over his veto.

Senator ZORINSKY. In other words, you would say he is free to create unilateral agreements unless the legislation pertaining to those subjects preclude him from doing so without Congressional advice and consent?

Mr. CHAYES. Well, let's keep it to the area of where, as Commander in Chief, he would have broad powers otherwise.

I don't read the *Belmont* and *Pink* cases as broadly as Mr. Meeker does, but that is a very technical matter, and we don't have to get into that. At least where he would not be changing domestic law in the ordinary sense, I think that the President has broad power to make Executive agreements without the concurrence of the Congress, but Congress can affect that power by legislation, Mr. Chairman, as it has done in the case of the Arms Control and Disarmament Act.

Mr. MEEKER. I would take a somewhat different view, I think.

Congress can obviously enact legislation over a President's veto to change domestic law so as to supersede an international agreement or treaty. But unless it does so, I don't think the President is disabled as a matter of domestic law, Mr. Chairman, from making and implementing an Executive agreement, which is within his Constitutional power.

I think there is a question as to whether the provision in the disarmament legislation is indeed constitutionally effective to inhibit and to prevent a President from making a disarmament agreement if he does not have the advice and consent of the Senate, or a vote of both Houses of Congress.

These questions of levels of armaments are pretty obviously in the area of Presidential authority as Commander in Chief and as the heart of the Government in charge of the Nation's foreign relations.

So I don't think it ought to be accepted that Congress or the Senate, through a measure of that sort, can redistribute Constitutional authority; just as it seems to me a Senate resolution or reservation to a treaty purporting to limit the President's power to terminate, I think, such a resolution, would not be valid.

Similarly, I would doubt very much that legislation enacted by the Congress could diminish the President's constitutional authority or indeed could increase it.

DEFINITION OF "UNDER THIS OR ANY OTHER LAW"

Senator Zorinsky. In the Disarmament Act itself, it states that: "No action shall be taken under this or any other law that will obligate the United States to disarm, or to reduce, or to limit the Armed Forces."

What, in your estimation, does "under this or any other law" mean?

Mr. Meeker. I think the effort of Congress was to establish that disarmament agreements can be made only with the concurrence of the Senate or of the whole Congress, and the issue that I raise is whether that is Constitutionally effective.

Now, obviously, a President who takes action that is inconsistent and in conflict with such a statute is in big political trouble, but I don't think it should be assumed that Congress, through legislation, can diminish the President's Constitutional authority.

Mr. Chayes. Well, I don't think Congress, through legislation, can diminish the President's Constitutional authority either.

It just depends on where you draw the line, as to his Constitutional authority. And one of the things we have been going through in the last 10 years, it seems to me, is some reevaluation of where those lines are to be drawn.

When I was legal adviser, I won't say it was at the apex of the imperial presidency, but it was pretty high up the hill, and we attempted to draw the line very favorably to the President, we in the Executive branch, and also to a degree that was acquiesced in by the people in Congress. I think our experience in foreign affairs and domestic affairs since that time has shown us we may have been too ready to acquiesce in a very broad reading of the powers of the President.

I remember back in 1952, I was law clerk to Justice Frankfurter, and I remember when the steel seizure case was decided. And there, Justice Jackson in his concurring opinion divides the powers into different segments. He says that when the President and the Congress act together, that is when the power is strongest because we have to assume that the whole Government acting together has the power to do something — in that case seizing the steel mills.

Where the President acts in the absence of legislation, he said, well, there you may tend to indulge some presumption in favor of the President where the foreign policy or war power elements of the situation are strong.

But he said where the President acts against the Congress, then the range of his power is at the narrowest. And of course, in that case it did not extend to seizing the steel mills, although it is perfectly clear that the troops needed the ammunition and the weapons that were being withheld because of the strike.

So I think that when you say that the Congress cannot limit the President's inherent powers by legislation, that is kind of a tautology: You still have to decide where that line is drawn.

And when we get to situations that Senator Helms characterized properly, I think, as in this kind of twilight zone, it seems to me that the Court, if it ever got that, and the rest of us as responsible constitutional interpreters should hesitate to interpret "in the twilight zone" in favor of an unlimited and unreviewable power of the Presidency.

Senator Zorinsky. Thank you very much, Professor Chayes and Mr. Meeker, for a very outstanding and informative presentation.

Thank you very much. The proceedings of this committee are adjourned.

[Whereupon, the hearing was adjourned at 4:35 p.m., subject to the call of the Chair.]

24. STATEMENT OF HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 50-61

Mr. HANSELL. Mr. Chairman, I appreciate the opportunity to appear before you today to discuss Senate Resolution 15.

This resolution would express the sense of the Senate that approval of the Senate is required to terminate any mutual defense treaty between the United States and another nation.

UNITED STATES FULLY COMMITTED TO MUTUAL DEFENSE TREATIES

At the outset, I should like to emphasize on behalf of the administration that the United States is fully committed to our mutual defense treaties. We do not foresee any circumstances in which they would be terminated. There should be no doubts with respect to the strength and firmness of our commitments to our mutual defense treaties and to our treaty partners. Accordingly, this resolution raises an entirely hypothetical issue.

The CHAIRMAN. Now wait a minute. Don't you think that is a bit of hyperbole — you don't see any circumstances in which mutual defense treaties would be terminated?

There are mutual defense treaties that are moribund, like SEATO. Even the headquarters structure has been abandoned. SEATO was never honored, except in its breach, by any of the major signatories, except the United States. Are we going to go on living forever with SEATO?

Mr. HANSELL. Mr. Chairman, this, of course, is intended to address all of our mutual defense treaties.

The CHAIRMAN. Well, that is one of them.

You know, I don't think the State Department serves itself well when it comes in with such overstatements.

Mr. HANSELL. Well, at the moment, with respect to SEATO, it is in force and we remain a party to it. It is an obligation and we don't foresee an occasion that would call for termination of it. Recognizing the facts that you mention, our concern with the resolution is that it somehow suggests that there may be on the part of the Senate, concerns with regard to intent to terminate mutual defense treaties.

The CHAIRMAN. Are you going to tell us that forever and ever, you cannot foresee circumstances when any of these treaties would ever be terminated? On its face, that statement doesn't make any sense. I can foresee many circumstances and so can you in this changing world where it would no longer be in our national interest to preserve or perpetuate a given treaty.

We have just done it with Taiwan. We are just in the act of terminating a mutual security treaty.

It just doesn't seem to me to be helpful to the State Department to say this. It doesn't give you much credibility when you come up here and make a statement like that. This is my only point. I don't think you give us reassurance by making that kind of statement.

Gentlemen, I'm terribly sorry, but we have another vote on. We will come back again to take this matter up where we are leaving it off.

The committee will be in recess for a few minutes.

[A brief recess was taken.]

The CHAIRMAN. The hearing will come back to order.

The prepared statement of the Department of State will be included in the record as though read so that we may go directly to questions.

[Mr. Hansell's prepared statement follows:]

PREPARED STATEMENT OF MR. HERBERT J. HANSELL

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to discuss Senate Resolution 15.

This Resolution would express the sense of the Senate that approval of the Senate is required to terminate any mutual defense treaty between the United States and another nation.

At the outset I should like to emphasize on behalf of the Administration that the United States is fully committed to our mutual defense treaties. We do not foresee any circumstances in which they would be terminated. There should be no doubts with respect to the strength and firmness of our commitments to our mutual defense treaties and to our treaty partners. Accordingly, this resolution raises an entirely hypothetical issue.

I recognize that the resolution has been proposed as a consequence of the termination of the mutual defense treaty with Taiwan. However as this Committee is fully aware, the termination of that treaty occurred in unique circumstances, which would not be applicable with respect to any other U.S. defense treaty.

The termination of that treaty occurred in the context of and was necessary because of the establishment of relations with the Government of the People's Republic of China as the legal government of China. From the time of the 1972 Shanghai Communique it was acknowledged by this Government that all Chinese maintained that there was but one China, and it was recognized that normalization would mean that it would not be possible to continue that mutual defense treaty in force. The circumstances associated with termination of recognition of Taiwan as a government, and recognition of the PRC as the sole government of China, obviously were unique to that situation, and are without any relevance or application whatsoever to any other mutual defense treaty or treaty partners.

U.S. Constitutional history also demonstrates that there is no need for such a resolution. The genius of the Constitutional Framers is once again shown by the fact that, while the Constitution is silent on the issue of treaty termination, there has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on treaty terminations. Various treaties have been terminated in two centuries of U.S. Constitutional history, some involving action by both branches, some by the Executive alone. There have been very few instances of formal or official disagreement by one branch with action taken by the other relative to treaty termination. This record indicates clearly that our Constitutional practice of accommodation has worked successfully for nearly 200 years and that it ought not to be tampered with now.

While treaty termination may be, and sometimes has been, undertaken by the President following Congressional or Senate action, such action is not legally necessary. Presidents have often terminated treaties without Senate or Congressional action.

The President's Constitutional authority to terminate treaties is currently the subject of litigation in the Federal-District Court for the District of Columbia, in the case of *Goldwater et al.* versus *Carter et al.*, a suit instituted by Members of this body and of the House of Representatives against the President and the Secretary of State.

Mr. Chairman, the existence of that litigation places the Executive branch in a dilemma. Our presence here today in response to the Committee's request that we testify on S. Res. 15 is evidence of our strong desire to be as cooperative as possible with this Committee and the Senate. At the same time, out of deference to the Court, we do not think it would be appropriate for the Executive branch, which is a party to that litigation, to argue its case publicly in another forum. Accordingly, we trust the Committee will understand that, while we do have some general comments on the broad Constitutional issues related to treaty termination, we are not able to deal with certain of these issues in this hearing as fully as we would like to.

The reasons underlying our view of the President's power to terminate treaties are set forth in a brief filed by the Department of Justice with the Court on behalf of the President and Secretary of State; with the Committee's permission, we will submit a copy of that brief for the record of this hearing.

Mr. Chairman, the view of the Constitution reflected in the Resolution would in our judgment be in sharp conflict with the President's Constitutional responsibility and authority, and would be an unwise departure from US Constitutional practice. There are a number of practical reasons why, in our form of government, the President needs to have authority to terminate treaties. Over the years the United States has made a great many treaties with other States, and it has terminated a comparatively small number of these treaties. In each case there is a good reason for termination.

Those reasons can vary from a change in our view of the legal status of one of the parties, as in the case of Taiwan, to the enactment of legislation in the United States which makes it impossible for the US to meet its treaty obligations. There may be a fundamental change in circumstances that were relied upon by the parties in making the treaty or a material breach by the other party that warrants a firm and prompt response.

There are also situations where the President is called upon to determine whether a treaty remains in force or is suspended. Such questions arise for example when a new State is formed, when diplomatic relations are suspended, when the parties become engaged in armed conflict, and when a treaty is fully executed or becomes obsolete. In United States practice these judgments are made by the President. So, too, in cases of treaty termination, a judgment will be needed that may engage the responsibilities assigned to the President under the Constitution or that cannot practicably be determined by a vote. There will be instances, too, Mr. Chairman, when the President needs to be able to act expeditiously to terminate a treaty and not just in emergencies affecting the national security.

There are other considerations that enter into the analysis of treaty termination issues. The President needs to have the option of using the possibility of treaty termination in his bargaining with other nations, and to exercise fully his constitutional responsibility for recognition of foreign governments under the Constitution. A treaty may become impossible to perform, or the other party may wish to terminate the treaty. In such circumstances, the President should be in a position to act.

Mr. Chairman, substantial differences in the consequences of treaty making and treaty termination explain the different procedures involved in the two processes. Put most simply, treaty termination is less risky and significant than treaty making, and may have to be accomplished rapidly.

Professor Louis Henkin, in *Foreign Affairs and the Constitution* (1972), explained why the President alone may terminate treaties:

> "... perhaps the Framers [of the Constitution] were concerned only to check the President in 'entangling' the United States; 'disentangling' is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means or acts". (At p. 169.)

Mr. Wallace McClure, in *International Executive Agreements* (1942), wrote that the Senate was a check against the President's treaty-making power, but that termination, or "negative action, not being feared by the constitution makers, was left to the repository of general executive power, that is, to the President". (At p. 306.)

The views I have expressed comport with the modern practice of the United States and with the views of most scholars who have addressed the issue. Numerous authorities on Constitutional and international law who have addressed this issue have concluded that the President may terminate treaties, without specification or limitation as to the type of treaty. For example, the American Law Institute, in the *Restatement of Foreign Relations Law of the United States* (1965), states in Section 163:

> "Under the law of the United States, *the President* or a person acting under this authority, *has with respect to an international agreement to which the United States is a party, the authority to . . . take the action necessary to accomplish* under the rule stated in section 155 *the termination of the agreement in accordance with provisions included in it for the purpose . . .*" (At p. 493.)*

The Restatement commentary to this provision states that this rule is "based on the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by Article II, Section 1, of the Constitution". (At p. 493.)

Professor Henkin states:

> "Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; *nor has the Senate any authoritative voice in interpreting a treaty or in terminating it.*" (*Foreign Affairs and the Constitution*, at p. 136.)

Dr. Elbert M. Byrd, Jr., of the University of Maryland, has written in his book *Treaties and Executive Agreements in the United States* (1960) that:

> "... from a constitutional view, it is much easier to terminate treaties than to make them. A treaty by definition in constitutional law, can come into existence only by positive action by the President and two-thirds of the Senate, but a simple majority of both Houses with the President's approval can terminate them, and *they may be terminated by the President alone*." (At p. 145.)

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* Emphasis supplied throughout.

Professor Laurence H. Tribe, of the Harvard Law School, has written in his recently published *American Constitutional Law* (1978) as follows:

> "Although influenced (often decisively) by congressional action or constitutional restraint, *the President . . . has exclusive responsibility for* announcing and implementing military policy, for negotiating, administering, and *terminating treaties* or executive agreements; for establishing and breaking relations with foreign governments; and generally for applying the foreign policy of the United States." (At pp. 165-166.)

Mr. Wallace McClure, in his work entitled *International Executive Agreements* (1941), wrote:

> "It is customary for treaties to carry provisions laying down the steps to be taken if one of the participating governments wishes to divest itself of the obligations which have been assumed; for instance, a year's notice by one party to the other or others. But treaties do not specify the organ of the national government by which such notice is to be given. *In the United States the Executive gives the notice. Sometimes he has given it on his own initiative solely.*"

Professor Myres S. McDougal, William F. Townsend, Professor of Law at the Yale Law School, wrote as follows in his study with Asher Lans on "Treaties and Congressional-Executive or Presidential Agreements: Inter-changeable Instruments of National Policy", 54 *Yale Law Journal* 336 (1945): ". . . Termination (of treaties) may be effected by *Executive denunciation*, with or *without* prior *Congressional authorization.*" (At p. 336.)

Professor Randall H. Nelson, of Southern Illinois University, in an article entitled "The Termination of Treaties and Executive Agreements by the United States: Theory and Practice", 42 *Minnesota Law Review* (1958):

> "Diplomatic practice coupled with judicial opinion demonstrates that the President, as the chief organ of foreign relations, has the primary responsibility with respect to the termination of treaties. *He may perform this function alone* or in conjunction with the Congress or the Senate." (At p. 906.)

The late Professor Jesse S. Reeves of the University of Michigan, in an article entitled "The Jones Act and the Denunciation of Treaties", 15 *American Journal of International Law* (1921), stated that:

> "It seems to be within the power of the President to terminate treaties *by giving notice on his own motion without previous Congressional or Senatorial action.* It would seem, on the other hand, that the President cannot be forced by Congress or by the Senate to perform the international act of giving notice." (At p. 38.)

Professor Westel Willoughby, late of Johns Hopkins University, wrote in his work *The Constitutional Law of the United States* (1929) that:

> "It would seem indeed, that there is *no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress* for its approval and ratification although, as has been seen, this has been done several times." (Vol. I, at p. 585.)

In summary, Mr. Chairman, we urge that the Committee not approve this resolution. We believe it is not needed, that it unnecessarily raises questions as to the intentions of the United States to adhere to its mutual defense treaties.

and that it is in conflict with US Constitutional practice which has worked successfully for nearly 200 years.

Thank you, Mr. Chairman. I will be happy to try to respond to any questions you or the Committee members may have.

25. STATEMENT OF LAWRENCE A. HAMMOND, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 192-196

Mr. HAMMOND. Mr. Chairman, I am pleased to be here this afternoon in response to the Committee's letter of last week requesting the views of the Department of Justice and of the Attorney General on Senate Resolution 15 concerning mutual defense treaties.

LAWSUIT CHALLENGING PRESIDENTIAL TREATY TERMINATION AUTHORITY

Mr. Chairman, as you noted in your opening remarks, there is a lawsuit presently pending in the district court for the District of Columbia which raises the issue of the President's authority to terminate the mutual defense treaty with the former Republic of China. The President is the named defendant in that suit and the Department of Justice, in the performance of its statutory duty, is representing the President.

The pendency of that litigation places this Department in a difficult, although certainly not unfamiliar, situation. As attorneys for the United States, we are bound by the canons of ethics and by the governing rules of court for the US District Court for the District of Columbia. Those sources prevent us, among other things, from commenting on the merits of the claims upon which we have relied in that litigation. Specifically, I refer the Committee to disciplinary rule 7-107 (G) of the Code of Professional Responsibility, to Ethical Consideration 7-33 of that code, both of which are quoted in pertinent part in this statement, and to Rule 100 of the US District Court Rules for the District of Columbia, which make those rules and standards binding on attorneys appearing in Federal court in this circuit.

The CHAIRMAN. Excuse me, but I believe I know where you are headed. You are simply saying that you agree with Mr. Hansell, right?

Mr. HAMMOND. Yes.

The CHAIRMAN. Let me then ask that we insert your statement and proceed directly to our questions.

[Mr. Hammond's prepared statement follows:]

PREPARED STATEMENT OF MR. LARRY A. HAMMOND

Mr. Chairman:

I am pleased to be here this afternoon in response to the Committee's letter of last week requesting the views of the Department of Justice and of the Attorney General on Senate Resolution 15, concerning mutual defense treaties.

As you are well aware, there is a lawsuit presently pending in the District Court for the District of Columbia which raises the issue of the President's authority to terminate the Mutual Defense Treaty with the former Republic of China. *Goldwater v. Carter*, Civil Action No. 78-2412 (D.D.C.). The President is the named defendant in that suit and the Department of Justice, in the performance of its statutory duty, is representing the President. The pendency of that litigation places this Department in a difficult, although not unfamiliar, situation. As attorneys for the United States we are bound by the canons of ethics and by the governing rules of court for the United States District Court for the District of Columbia. Those sources prevent us, among other things, from commenting on the merits of the claims upon which we have relied in that lawsuit. Specifically, I refer the Committee to Disciplinary Rule 7-107 (G) of the Code of Professional Responsibility*, to Ethical Consideration 7-33** of that Code, and to Rule 100 of the US District Court Rules for the District of Columbia, which makes those rules and standards binding on attorneys appearing in federal court in this Circuit. Our posture is made particularly difficult in this case because we have taken the position in the District Court that the issue of Presidential power to terminate treaties is a matter not appropriate for judicial resolution. Indeed, to whatever extent the question may be thought not to have been finally determined by the Constitution itself, it is a matter properly resolvable by accommodation between the Executive and Legislative Branches. Nonetheless, so long as that litigation is pending we are significantly restricted in our ability to comment on the underlying Constitutional questions.

Outside the context of this particular lawsuit we agree that the Senate is entitled to the legal views of the Executive Branch on the question whether the resolution now before this Committee expresses an appropriate view of the controlling constitutional principles concerning treaty termination. On that question I can advise the Committee that it is the Justice Department's opinion that the President's power in this area cannot properly be circumscribed in the manner suggested in Senate Resolution 15. Our reasons for so concluding are the same as those expressed in the Statement of Mr. Herbert Hansell, the Legal Adviser for the Department of State, which has been submitted to this Committee. We concur in its conclusions and reasoning. Thank you.

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* A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

1. Evidence regarding the occurrence or transaction involved.

* * *

4. His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
5. Any other matter reasonably likely to interfere with a fair trial of the action.

** A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

26. QUESTIONS TO AND ANSWERS FROM THE LEGAL ADVISER AND THE DEPARTMENT OF STATE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 197-208

Senator JAVITS. Would you agree with him on the substance or do you just agree with him on the fact that you shouldn't speak?

Mr. HAMMOND. No, we also agree with him on the substance.

Senator JAVITS. Is that the essence of your brief?

Mr. HAMMOND. Yes, and with the brief filed in the court.

The CHAIRMAN. Let me ask you this. Are you constrained with respect to answering questions because of the court action?

Mr. HAMMOND. Mr. Chairman, it is our view that the constitutional questions can be addressed without necessarily talking about the particular claims and facts of this case. To that extent, we do not feel restrained.

The CHAIRMAN. All right.

VARIOUS WAYS OF TERMINATING A TREATY

Let's consider the different ways that a treaty can be terminated, ways that don't seem to be subject to much doubt.

Clearly a treaty can be terminated if the two Houses of Congress agree upon its termination and the President concurs by signing a joint Congressional resolution. Would you agree?

If the Congress passes a joint resolution terminating a given treaty and the President concurs by signing the resolution, is that one method by which a treaty can be terminated?

Mr. HANSELL. May I answer that, Mr. Chairman?

The CHAIRMAN. Please.

Mr. HANSELL. That would, in fact, terminate the domestic law effect of the treaty. The President would have to take action to terminate the treaty as a matter of the international relationships that are created by the treaty.

TERMINATION OF TREATIES WITH NO PROVISIONS FOR TERMINATION

The CHAIRMAN. Suppose that the treaty does not contain any provision relative to termination? Suppose that treaties were written the way your statement was written and that it was never contemplated that under any circumstances would any mutual defense treaty ever be terminated, so no termination clause was even placed in the treaty. How would such a treaty be brought to an end? If it contains no termination clause, how would such a treaty be terminated?

Mr. HANSELL. The President, under the Constitution, would have the power to terminate the treaty.

The CHAIRMAN. With or without the concurrence of Congress?

Mr. HANSELL. He would have the authority to do it without the concurrence of Congress.

The CHAIRMAN. On what basis do you make that statement?

Senator JAVITS. What is the authority?

Mr. HANSELL. The authority is the President's constitutional role in implementing treaties and his authority under the Constitution to conduct the foreign relations of the United States.

The Chairman. Are you making an argument that he has inherent authority to terminate treaties at will, whether or not the Congress concurs and whether or not the treaty contains any provision to terminate? That's what you're saying.

Mr. Hansell. I would not make that sweeping a generalization, Mr. Chairman.

The Chairman. But it seems to me you have.

Mr. Hansell. I am saying that the Constitution does repose in the President authority to terminate international obligations of the United States.

The Chairman. Where does the Constitution so provide?

Mr. Hansell. The power of the President as defined in article II, Mr. Chairman.

The Chairman. Well, where does article II say that the President may terminate treaties or international agreements?

Mr. Hansell. It does not expressly so state, of course.

Senator Javits. Well, what are you relying on? Read it to us.

The Chairman. Just what are you relying on?

Mr. Hansell. I would like to express one very important comment in regard to all this. As I think Senator Javits expressed earlier in this hearing, this is fundamentally a matter of accommodation between the two branches. Let me quote one paragraph from my prior statement that has been submitted for the record. It is this:

> There has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on treaty terminations. Various treaties have been terminated in two centuries of U.S. Constitutional history, some involving action by both branches — that is, the legislative and executive — and some by the executive alone. There have been very few instances of formal or official disagreement by one branch with action taken by the other relative to treaty termination.

PRESIDENTIAL AUTHORITY UNDER ARTICLE II OF THE CONSTITUTION

The Chairman. Well, that may be because there have been relatively few cases where anyone from the State Department has asserted that the President has the authority, with or without the concurrence of the Congress, to terminate any treaty whether or not it contains a termination clause, and can do so unilaterally.

I ask you for your source of authority for such a statement. You said article II. I asked you what part of article II, and you have not yet responded appropriately.

Mr. Hansell. May I quote, Mr. Chairman, from the American Law Institute Restatement of the Foreign Relations Law of the United States:

> Under the law of the United States, the President or a person acting under his authority, has, with respect to an international agreement to which the United States is a party, the authority to take the action necessary to accomplish

and then it refers to a rule in section 55, which we can get to in a moment

> the suspension or termination of the agreement in accordance with provisions included in it for the purpose.

The Chairman. But that does not respond to my question. I am talking about a treaty that does not contain any such provision.

Mr. Hansell. I understand that, Mr. Chairman.

The **Chairman**. You have also cited the Constitution. Will you cite me the provision of the Constitution on which you rest your case?

Mr. **Hansell**. I would need to refer you to article II, the provisions of which I don't have with me at the moment.

Senator **Javits**. We will get that for you.

Mr. **Hansell**. It concerns the power of the President to conduct the foreign relations of the United States, which have inherently been recognized as the basis for that power.

If I may paraphrase the brief of the United States in the litigation that previously was referred to, it notes that article II provides, in pertinent part, that the Executive power shall be vested in a President of the United States; that the President shall be Commander-in-Chief; that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. The statement in the brief on this issue is as follows:

> Article II confers the Executive power in general terms, strengthened by specific provisions where emphasis was appropriate and limited by direct constraints where limitation was intended. No express constraint was placed on the termination of treaties nor was any express power with respect to treaty termination granted to Congress. The Senate role of advising and consenting in the making of treaties is, therefore, not an independent source of legislative power, but is, instead, a limitation upon the treaty-making power granted to the President.

The President's power to terminate treaties, Mr. Chairman, is derived by implication, not by express terms, from article II. In two centuries of constitutional history exercised on a number of occasions, and has been recognized, I think, by most authorities. It has been the consistent view of the Department of State and the executive branch that the President has that authority.

PRECEDENTS FOR PRESIDENTIAL TERMINATION OF TREATIES WITHOUT TERMINATION PROVISIONS

The **Chairman**. Well, we have been given a good deal of scholarly opinion to the contrary. The committee has been referred to any number of cases where the Congress has acted to terminate treaties with the concurrence of the President.

Can you cite a case where the President has terminated a treaty that did not contain a provision relating to termination, and without the concurrence of the Congress?

You heard Senator Goldwater examine, or analyse, the 12 cases the State Department had presented and said that there were extenuating circumstances in those cases and, therefore, they were not valid as precedents for the proposition that you put to us this afternoon.

Mr. **Hansell**. I did hear that, Mr. Chairman, and I welcome the opportunity to refute that comment. In the memorandum which we have submitted for the record, and also in the brief filed with the district court, are identified a number of instances of Presidential termination. In my statement, if you will turn to pages 6, 7, 8, 9, and 10, you will see there listed statements by a group of eminent constitutional and international law scholars, such as Professor Henkin, Professor McClure, Dr. Byrd of Maryland, Professor Tribe of Harvard, Professor McDougal of Yale, Professor Nelson of Southern Illinois, Professor Reeves of Michigan, Professor Willoughby of Johns Hopkins, and quotations from their works on this issue.

We did not include in my statement, but there have been included in the memorandum I have submitted for the record, the dozen instances to which Senator Goldwater referred. I do have to say to you, without any reflection on the scholarship of his staff, that his characterization can only be described as erroneous.

Let me identify some of those for you, Mr. Chairman, if I may, because I think in answer to your question I can quickly enumerate the treaty terminations that would respond to your question.

I will identify very hastily the cases listed in the memo, and then those that I can recall which were treaties that did not have a termination notice provision.

In 1815, President Madison terminated the Treaty of Amity and Commerce with the Netherlands; in 1899, President McKinley terminated certain articles of the Extradition, Friendship, and Commerce Treaty with Switzerland; in 1920 and this one I am quite sure was a treaty that had no termination clause President Wilson terminated a Treaty of Amity, Commerce and Navigation with Belgium. These were all instances where there was Presidential action only.

In 1927, President Coolidge gave notice of termination of the 1925 treaty with Mexico on the prevention of smuggling. In 1933, President Roosevelt issued notice of withdrawal from the Multilateral Convention for the Abolition of Import and Export Prohibitions and Restrictions. In 1933 President Roosevelt gave notice of termination of the Extradition Treaty with Greece. In 1936, President Roosevelt terminated the 1871 Treaty of Commerce with Italy. In 1939, President Roosevelt terminated a 1911 Treaty of Commerce and Navigation with Japan. In 1944, President Roosevelt terminated the Inter-American Convention for Trademark and Commercial Protection.

In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on the Uniformity of Nomenclature for the Classification of Merchandise.

In 1962, President Kennedy terminated the 1902 Convention on Commercial Relations with Cuba. In 1965, President Johnson gave notice of denunciation of the 1929 Warsaw Convention Concerning International Air Travel, which subsequently was withdrawn contrary to the request of a number of members of this body.

As I said, I am clear about one of those cases, but would have to check the others again, as to whether or not there was a provision for notice of termination.

The CHAIRMAN. Senator Javits?

Senator JAVITS. Thank you, Mr. Chairman.

Mr. Hansell, you don't have to answer any of these questions orally now. Just take them away and think about them. Have a home examination.

It seems to me that we need to know the following.

EFFECT OF PASSAGE OF SENATE CONCURRENT RESOLUTION 2

If we passed Senate Concurrent Resolution 2 and the House passes it, and the President vetoes it, which we must assume, as he may do that, and we passed it over his veto, it then becomes law. Now, having passed the law contained in this bill, would the President thereafter be able to terminate a treaty according to its terms?

Mr. HAMMOND. Excuse me, Senator, are you referring to Senator Goldwater's resolution?

Senator JAVITS. I am referring to the resolution introduced by Senator Goldwater, Senate Concurrent Resolution 2.

Mr. Hammond. That is a concurrent resolution, I believe, and is not subject to the President's consideration or to his veto.

Senator Javits. OK, let's leave out the concurrent resolution. Suppose we passed Senate Joint Resolution 2, and it was passed over the President's veto, that is, he had vetoed it. Would he, in your opinion, thereafter, have the power to terminate a treaty, except according to the terms of the law which we have passed?

That is the real $64 question to me. Frankly, I don't think we can do anything about the past, including the PRC. But that doesn't solve it at all. That's not even why it was raised.

That is why I said you don't have to answer this now.

Mr. Hansell. Senator, I think I would like to accept your invitation not to do so for the reason that you have posed a hypothetical issue which we prefer, for a good many reasons, not to try to speculate about. But I understand the serious interest of the Committee in the question and with your permission, I would like to take it and consider how we might respond to it.

Senator Javits. Might I ask you to do this hurriedly and quickly. We don't want you to go away under any false impression. There is really nothing hypothetical about it because we can report out a joint resolution instead of a concurrent resolution. There is nothing to stop us from doing that at all. On the contrary, I am sure that the sponsors would be very pleased to do this.

That is a very pertinent question.

[The information referred to follows:]

CAN THE CONGRESS BY LAW PROHIBIT THE PRESIDENT FROM TERMINATING EXISTING OR FUTURE TREATIES WITHOUT CONGRESSIONAL CONCURRENCES?

[supplied by Department of State]

In our judgment, a statute purporting to prohibit the President from terminating existing or future treaties without Congressional concurrence would be unwise as a matter of policy, would raise serious Constitutional questions, and would be in conflict with a Constitutional practice that has worked successfully for nearly 200 years.

As a matter of policy, it would be unwise to weaken in this fashion the President's power to conduct foreign policy, and in any event such legislation would be unworkable more often than not. There are many situations in which the President must make determinations and findings of fact that will result in a termination of a treaty, or its suspension or in a withholding of performance.

The President must decide whether there has been a material breach by the other party justifying responsive action, or whether armed conflict or other emergency indicates a termination or suspension. There may have been a fundamental change in the circumstances relied upon in the making of the treaty, and this too must be determined by the President.

The President must decide whether a treaty has become impossible to perform, and whether a treaty has been fully executed or has become obsolete. The President will have to decide whether a change in the legal status of one of the parties will necessitate termination, and he will have to make decisions regarding the effect of the formation of a new State, or the severance or suspension of diplomatic relations with an existing State.

Even aside from these determinations, which must be made by the President, it would not be wise to weaken the President's option of using the possibility of treaty termination in his bargaining with other nations, or to use treaty termination as an incident to recognition. In addition, the other party to a treaty may wish to terminate, even without a termination provision, and the President should be in a position to respond through executive action.

As a matter of law, we believe that legislation of this kind would raise serious Constitutional questions. In our view, treaty termination is a Presidential power under article II, Section 1, of the Constitution.

Article II deals with the executive power and provides in pertinent part that "The executive power shall be vested in a President of the United States of America . . ." and that "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . .". Article II confers the executive power in general terms, strengthened by specific provisions where emphasis was appropriate, and limited by direct constraints where limitation was intended. No express constraint was placed on the termination of treaties, nor was any express power with respect to treaty termination granted to Congress. The Senate role of advising and consenting in the making of treaties is, therefore, not an independent source of legislative power but is, instead, a limitation upon the treaty-making power granted to the President. Such limitations upon the general grant of executive power are to be strictly construed and not extended by implication. *Myers* v. *United States*, 272 U.S. 52, 164 (1926); 1 *Annals of Congress*, 462-64, 496 (1789). Cf., Sutherland, 2A *Statutory Construction* §47.08 (1973).

The great majority of modern Constitutional and international law authorities and scholars who have addressed the issue support the power of the President, acting alone, to terminate treaties. Many of these authorities have been cited in the memorandum from the Legal Adviser to the Secretary of State dated December 15, 1978. The legal scholars speak in sweeping terms. Thus Professor Laurence Tribe of Harvard Law School states that "the President . . . has exclusive responsibility for . . . terminating treaties". Professor Henkin of Columbia Law School states that the Senate has no "authoritative voice in interpreting a treaty or in terminating it". Professor McDougal of Yale Law School states that "termination [of treaties] may be effected by executive denunciation, with or without prior Congressional authorization". Professor Reeves of Michigan, writing as long ago as 1921, stated that the President may give notice of termination of a treaty "on his own motion without previous Congressional or Senatorial action" and that "the President cannot be forced by Congress or by the Senate to perform the international act of giving notice".

Practice and precedent also confirm the President's power to terminate treaties. The Department of State analysis of U.S. treaty termination practice shows that there have been 25 instances of Presidential action to terminate treaties throughout the nation's history. The President acted alone on 12 occasions, and there was some form of prior or subsequent Congressional action in 13 cases. Most of the 12 cases of Presidential termination without action by Congress occurred in the 20th century. The details are set forth in the Legal Adviser's memorandum of December 15, 1978.

It is important to note that in the modern era, that is, the last 60 years, no effort has been made by Congress to interpose a Constitutionally based objection to the President's unilateral treaty termination action. This has been true even when the Senate focussed directly on a treaty termination, such as President Johnson's 1965 notice of withdrawal from the 1929 Warsaw Convention on air travel.

It should also be noted that several of the cases of termination action by the President acting alone involved important treaties. In addition to the Warsaw Convention case, there was also President Kennedy's notice of termination of the 1902 Commercial Treaty with Cuba, President Roosevelt's 1939 notice of termination of the 1911 Commercial Treaty with Japan, President Roosevelt's 1933 notice of termination of the 1931 Extradition Treaty with Greece (the notice was subsequently withdrawn), and President Coolidge's 1927 notice of termination of the 1925 Treaty with Mexico on the Prevention of Smuggling.

Finally, our history demonstrates that there is no need for such legislation. As noted in the Legal Adviser's statement, there has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on the issue of treaty termination. Some treaties have been terminated by the President acting alone, and some with Congressional action, but there have been very few instances of disagreement by one branch with action taken by the other. Our Constitutional practice of accommodation has worked successfully for nearly 200 years, and there is no need to tamper with it now.

27. REFERENCE TO INTERNATIONAL COURT OF JUSTICE OF DISPUTES UNDER TRUSTEESHIP AGREEMENT FOR JAPANESE MANDATED ISLANDS

Recommendation:

1. The United States should not take the initiative to propose a provision in the trusteeship agreement for the Japanese mandated islands which would require reference to the International Court of Justice of disputes arising under the agreement.

2. If the inclusion of such a provision is supported by other delegations, the United States should take the position that:

> *a.* The United States by its declaration of compulsory jurisdiction has already accepted a substantial obligation to refer disputes arising under the trusteeship agreement to the Court; and
>
> *b.* The United States would have no objection to the inclusion of such a provision in the trusteeship agreement so long as it contained a proviso to the effect that it was "subject to any limitations and conditions contained in the declarations of the respective members under Article 36 of the Statute of the Court".

3. The United States should oppose the inclusion of any provision which would impose upon it any obligation to accept jurisdiction of the Court which goes beyond the Senate approved declaration accepting jurisdiction of the Court on behalf of the United States.

Discussion

The trusteeship agreement submitted by New Zealand to the General Assembly contains the following provision (Article 16):

> "If any dispute should arise between the administering authority and another member of the United Nations, relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or similar means, shall be submitted to the International Court of Justice."

Similar provisions are contained in the other trusteeship agreements submitted to the General Assembly, some providing "If any dispute *whatever* . . .". Also, the terms of the Japanese mandate confirmed by the Council of the League of Nations for the islands included a similar provision as an obligation of the mandatory.

The obligation that such a provision would impose upon the United States as the administering authority of the former Japanese mandated islands exceeds, in certain respects which are discussed below, the obligation of compulsory jurisdiction accepted by the United States on the basis of a resolution approved by two-thirds vote of the Senate:

> *a.* It is assumed that the above provision would require submission of disputes either by the administering authority or by another member of the United Nations which is a party to the dispute. The provision would, on

> this assumption, satisfy the requirement of reciprocity which is one of the features of the Senate resolution.
>
> *b.* It is not entirely clear whether the above provision would require the submission to the Court of disputes which are essentially within the domestic jurisdiction of the administering authority.

On the one hand, it may be contended that the provision is not intended to require such submission in view of the absence of any specific reference to a waiver of the immunity expressed in the principle of Article 2, Paragraph 7, of the Charter that nothing in the Charter shall require the members to submit matters essentially within their domestic jurisdiction to settlement under the Charter. By such reasoning it would be concluded that whether or not a dispute involved the interpretation or application of the trusteeship agreement, such dispute, if it is essentially within the domestic jurisdiction of the administering authority, is not required to be submitted to the Court for decision.

On the other hand, it may be argued that by means of the above provision (especially when the phrase "any dispute *whatever*" is present), the administering authority has consented to the compulsory jurisdiction of the Court in all cases regardless of the principle of Article 2, Paragraph 7. Alternatively, it may be argued that by the inclusion of the above provision in the trusteeship agreement, it is recognized that any matter relating to the interpretation or application of the trusteeship agreement is not a matter which is essentially within the domestic jurisdiction of the administering State and is therefore properly to be referred to the Court.

The Senate resolution relative to the acceptance of compulsory jurisdiction of the Court contains a proviso that the declaration shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States*". It is quite possible that the United States will regard certain matters which may be the subject of disputes arising under the trusteeship agreement as being essentially within its domestic jurisdiction, even though such disputes may involve the interpretation or application of the trusteeship agreement. In any event, there would appear to be no doubt that the obligation which would be imposed on the United States by the above provision, regardless of the interpretation given to it, would not contain the limitation which is present in the phrase "as determined by the United States". In view of the action by Congress imposing this particular limitation, it would be unwise for the Executive to accede to an obligation of compulsory jurisdiction in the case of the Japanese mandated islands which does not contain this limitation.

> *c.* If the trusteeship agreement is to be of a bilateral character, between the United States and the Security Council, the agreement would not be enforceable in the Court unless, as seems probable, the Court would recognize suits by other Members of the United Nations for the purpose of enforcing their rights under the agreement. If the Security Council alone were competent to enforce the agreement against the United States, no dispute could be adjudicated by the Court inasmuch as the Security Council may not be a party before the Court and the only legal remedy of the Security Council would be to request an advisory opinion from the Court.

If other members of the United Nations are permitted to enforce their rights against the United States under the trusteeship agreement directly in the Court, the agreement would in this respect resemble a multilateral agreement. In such case, it should be noted that the Senate resolution provides that the declaration of compulsory jurisdiction shall not apply to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction". Even though the trusteeship agreement may not be a "treaty", it is doubtful whether the principle in this proviso was intended by Congress to apply only to treaties and not to executive agreements, since breaches of obligations under both come equally within the compulsory jurisdiction accepted in the declaration. The acceptance of the New Zealand type provision would therefore appear to constitute an agreement to jurisdiction of the type excepted in the proviso in the absence of special agreement. The type of provision which is recommended in this paper would permit as a limitation upon the agreement of the United States to jurisdiction of the Court over disputes arising under the trusteeship agreement, the requirement that all parties affected by the decision must also be parties to the case before the Court.

Certification

I, the undersigned, Davis R. Robinson, Agent of the United States of America, hereby certify that each document submitted by the United States of America pursuant to Article 56 of the Rules of Court is an accurate translation, transcription, reproduction, or representation.

(*Signed*) Davis R. Robinson,
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